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22

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of the Westmoreland Bar
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Westmoreland Law Journal

Containing

Decisions of the Courts of Westmoreland County, Pennsylvania

VOLUME IX

Bright vs. Morefield.

Jurisdiction of Justices of the Peace in action of trespass for a direct injury to personal property.

A Justice of the Peace has jurisdiction of an action of trespass brought to recover damages for an injury done against real or personal estate where the damages arise from an immediate injury such as were recoverable in the common law action of trespass but a Justice has no jurisdiction of an action where the damages to be recovered are consequential such as were recoverable in the common law action of trespass on the case.

A Justice has jurisdiction where his record discloses that "Plaintiff's claim is for * * * * repairs being necessary by the collision of the defendant's car * * * the defendant, himself, operating his own car at the time of the collision—the fault for said collision being entirely that of the defendant, and the damage claimed above being entirely direct and, not in any way consequential," as the action is for the recovery of damages arising by an actual and immediate injury done to plaintiff's personal property for which the plaintiff might have sought redress at the common law by an action of trespass vi et armis, but not by an action of trespass on the case.

In the Court of Common Pleas of Westmoreland County, No. 688 May Term, 1919. Certiorari.

John W. McFayden, for plaintiff in error.
James B. Weaver, for defendant in error.

McConnell, P. J.: The transcript shows that the action was commenced by "summons in trespass not exceeding $300.00." A judgment was rendered in favor of the plaintiff for $65.70. The cause of action, as set out in the transcript, is as follows: "Plaintiff's claim is for $65.70 for repairs to plaintiff's automobile, as per bill of Keystone Auto & Machine Co. Inc. hereto attached and made part of this de-

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mand—said repairs being necessary by the collision of the defendant's car, bearing Penn'a. license No. 173139, with plaintiff's car, on the 6th day of February, 1919, at the intersection of Chambers St. and Lloyd Ave. in the borough of Latrobe, Pa.—the defendant himself operating his own car, at the time of the collision—the fault for said collision being entirely that of Defendant, and the damage claimed above being entirely direct and, not in any way consequential."

In substance the errors assigned are (1) that the Justice had no jurisdiction. (2) That the transcript does not allege the making of any promise to pay for the repairs sued for. And (3) "The transcript shows upon its face that the damage for which claim is made, and for which the judgment was awarded, is indirect and consequential."

That the jurisdiction of a justice is limited, and, therefore, that the record should show his jurisdiction to render a judgment in the case exhibited in the transcript, as a proposition that no one will deny. If the first and last assignments of error appear from the transcript exhibited to be correct, the judgment must, of necessity, be reversed. But are they correct? A record cannot be condemned merely because the suit is not based on a contract, for a justice does have jurisdiction in some forms of trespass. "The justices of the several counties of this commonwealth and the aldermen of the city of Philadelphia shall have jurisdiction of actions of trover and conversion and of actions of trespass brought for the recovery of damages for injury done or committed on real and personal estate, in all cases where the value of the property claimed, or the damages alleged to have been sustained shall not exceed one hundred dollars." Section 1 Act 22 March, 1814, 6 Sm. 182, 2 Purd. Dig. pages 2155 and 2156.

Therefore, in some forms of trespass, justices are given by law jurisdiction. Under the above quoted provisions of the Act, for more than a century, it has been held that a plaintiff may sue before a justice for damages arising immediately from a trespass, and which would be recoverable in the common-law action of trespass vi et armis, and not such as are consequential, and which would be recoverable, if at all,

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only in an action of trespass on the case. "A justice of the peace has jurisdiction of actions of trespass for the recovery of damages for injury done or committed on real and personal estate. The damages for which plaintiff may sue before a justice in this form of action are such as arise where injury is immediate, and would be recoverable in the common-law action of trespass, and not such as are consequential, and would be recoverable, if at all, only in an action of trespass on the case." Gingrich v Sheaffer, 16 Sup., 299.

In the case of Connellsville Grocery Company, vs. Springer, 1 Justice's Law Reporter, page 45, (page— infra), we had occasion to examine the doctrine of the cases on this subject, and do not now deem it necessary to here repeat what was there said, at least in any greatdetail. Suffice it to say, say, that it was there held, that "A justice has jurisdiction where his record discloses that 'plaintiff brings suit against defendant for driving his horse and carriage into the buggy of the plaintiff', as the defendant is charged with doing an immediate damage to personal property, and the common law action of trespass vi et armis would be the appropriate form of action through which to obtain a remedy."

"Trespass against property, in common parlance, means an act by which immediate injury is done to the property, and this is the sense in which the legislature use it." Marsteller v Trimbley, 6 Binney, 33.

If the plaintiff had stated his case before the justice to be based on defendant's "negligence," that would show a case wherein the justice had no jurisdiction, inasmuch as that would exhibit a case wherein the damages were consequential, and, therefore, to be recoverable only in an action of trespass on the case, whereof the statute gives a justice no jurisdiction whatever. Ripple v Keast, 5 Dist. 31; Thirlow v Traction Co., 4 Dist. 83.

In Greasly v. Wright, 2 Kulp, 415, Judge Rice points out the case wherein a justice has been given jurisdiction in actions of trespass, and also the cases of trespass wherein he has not been given jurisdiction.

In a certiorari the question of jurisdiction is determin-

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able solely from what appears in the transcript. If any appeal had been taken and, from the evidence adduced at a trial in court, it was made manifest that the case was really predicated on **negligence**, the plaintiff therein could not recover, for the appeal would bring into court only such jurisdiction over the case as the justice had, by law, been invested with, and the justice had not been invested with jurisdiction over a suit for the recovery of consequential damage.

But, in this case, we do not inspect the evidence, but only the form of the record, and, according to what is therein found, this suit was only prosecuted before the justice for the recovery of damages arising by an actual and immediate injury done to plaintiff's personal property, for which plaintiff might have sought redress, at the common-law, by an action of trespass vi et armis, but not by an action of trespass on the case. From what appears in the transcript, it is made manifest that the justice had jurisdiction, and, therefore, the assignments of error are all overruled and the proceedings of the justice are affirmed.

Connellsville Grocery Co. v. Springer.

Jurisdiction of Justice of the Peace.—Trespass vi et armis—Consequential damages.

A justice of the peace has jurisdiction of an action of trespass brought for the recovery of damages for an injury done or committed against real or personal estate when the damages arise by an immediate injury; such as would be recoverable in the common law action of trespass vi et armis and not such damages as are consequential only in an action of trespass on the case.

A justice has jurisdiction where his record discloses that "plaintiff brings suit against defendant for driving his horse and carriage into the buggy of the plaintiff, . . . "as the defendant is charged with doing an immediate damage to personal property, for which the common law action of trespass vi et armis would be the proper form of action.

In the Court of Common Pleas of Westmoreland county. Certiorari. No. 247 November Term, 1901.

Williams, Sloan & Griffith, for Plaintiff in error.

W. S. Byers, for Defendant in error.

McConnell, J.: The Act of March 1, 1799, 3 Smith Laws 354, provided "for the recovery of damages for any trespass, wrong or injury done or committed against the real

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or personal estate of the plaintiff." That Act was construed not to "give jurisdiction to Justices of the Peace except in cases where damage arises by an actual and immediate injury done to real or personal property." It was not meant to include injuries arising without any act operating immediately on the body of the property. There are expressions also respecting the estimating the damages, by view or otherwise which seem to suppose that it must be a damage which might be judged of by inspection. Trespass against property in common parlance, means an act, by which immediate injury is done to the property, and this is the sense in which the legislature use it." Tilgham C. J., in Marsteller v. Trimbly, 6 Bin. 33.

The Act of 22nd. March, 1814, 6 Smith 182, provided that "the Justice of the Peace of the several Counties of this Commonwealth shall have jurisdiction of actions of trover and conversion, and of actions of trespass brought for the recovery of damages for injury done or committed on real and personal estate in all cases where the value of the property claimed, or the damages alleged to have been sustained, shall not exceed one hundred dollars." By the act 7 July, '79, this jurisdiction was extended to $300. This Act was construed in the same way as the Act of 1799, Justices have no jurisdiction in cases of consequential damages. Harrijas v. McGill, 1 Ash. 152. In negligence cases the injury is consequential. "The fact that the damages caused were the result of the negligence of the defendant shows them in their very nature to have been consequential." Thilow v. Phila. Co., 4 Dist. 53. A Justice would have jurisdiction of an action of trespass vi et armis, but not of an action of trespass on the case.

We must therefore look into the record to see whether the case therein set up is an action of trespass vi et armis or an action of trespass on the case. In the case last cited, the record showed the following cause of action: "Plaintiff sworn, claims of $11.75 damages for injury to personal property, to wit: One wagon, caused by striking the said wagon on the public highway, to wit: Ridge Avenue, in the City of Philadelphia, by a trolley car operated by the defendant and

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under their control upon July 21, A. D. 1894, owing to the negligence of the defendant." This was held by Judge Biddle to be a suit of trespass on the case for consequential and unliquidated damages and that therefore the Justice had no jurisdiction.

In the case of Grosley v. Wright, 2 Kulp. 415, the plaintiff's claim is this stated: "Plaintiff sworn, presents, bill amount paid Charles Smith damage for repairing buggy that defendant broke by running into it, on or about the 17th of January, 1881, $2.65; also claimed $2.50 for loss of buggy while awaiting repairs, and trouble; total amount of damages, $5.15." Judge Rice says in his opinion in the case: "It is the nature of the plaintiff's demand, and not merely the form of action in which the summon issues, which gives the Justice jurisdiction, and it is from the statement of the plaintiff's demand we must determine the question of his jurisdiction. A Justice has jurisdiction of actions of trespass brought for the recovery of damages for injury done or committed on real and personal estate. It has been many times decided that the damages for which a plaintiff may sue in this form of action are such as arise where the injury is immediate, and would be recoverable in the Common Law action of trespass vi et armis, and not such as are consequential, and would be recoverable, if at all, only in an action of trespass on the case. Where the plaintiff has an election of actions, and chooses to proceed for the recovery of consequential damages, rather than for those arising immediately from the injury, it is equally clear that his remedy is in the Common Pleas, and not before a Justice of the Peace. These principles, we think, too well decided to need the citation of authorities in their support. And here lies the error in this case. The demand of 'two dollars and fifty cents for loss of buggy while awaiting repairs and trouble,' is clearly for consequential damages, which could not be recovered in an action of trespass, and, if at all, only in an action of trespass on the case, and therefore was not within the jurisdiction of the Justice. Neither could it be brought within his jurisdiction by writing it with a demand of which he could take cognizance. We have no power to divide the judgment, and to affirm that part of it which is well founded, and therefore on

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account of the error stated the whole proceedings must be set aside."

In both these cases the proceedings were set aside because the cause of action was for consequential damages. In the first case the cause was wholly of that nature—in the latter it was partially so. With these cases as illustrations, let us look at the cause of action shown on the Justice's record in this case: "Plaintiff brings suit against defendant for driving his horse and carriage into the buggy of the plaintiff on the public road in East Huntingdon Township, Westmoreland County, Pa. Claim of plaintiff $5.00 damages."

This is substantially the language in which the plaintiff in the case of Grosley v. Wright states the first part of his claim. Judge Rice plainly indicates that that portion of the plaintiff's claim is within the jurisdiction of the Justice. He says "except in one particular this record is without error." The erroneous part of the record related only to the part of the claim "for loss of buggy awaiting repairs and trouble." No part of the record before us correspondns to the erroneous part of that record—but all of this record is substantially the same as the part of the record that was there held to be good. It charges the defendant with doing an immediate damage to personal property, and the common law action of trespass vi et armis would be the appropriate form of action through which to obtain a remedy. Of this the Justice has jurisdiction. There is no claim here made for consequential injuries—nor is it alleged that the cause of the injury was the negligence of the defendant.

Because the record on its face shows jurisdiction, the specification alleging to contrary is overruled. No other specifications was argued or pressed. No comment is needed with respect thereto. They are all overruled.

The proceedings before the Justice are affirmed.

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Dunlap vs. Brown.

Trespass for alienation of wife's affections—Evidence—Competency of husband to testify in support of a charge of infidelity of wife with defendant.

Where in an action of trespass against defendant for the alienation of the affections of plaintiff's wife, the plaintiff is offered as a witness to support an allegation of infidelity on the part of the wife, both husband and wife being in full life and not divorced, upon objection it was held:

That although plaintiff's wife was not a party to the suit, and in that sense, the husband would not be testifying against his wife, yet, in the sense of the law, he would be testifying against her, if he, by his proferred testimony, supported the charge made in the statement against the defendant, his wife would be particeps criminis in the commission of the alleged acts of illicit intercourse. The principle of the law operates on witnesses, not solely on parties to suits.

In the Court of Common Pleas of Westmoreland County. No. 342 November Term 1918. Motion to take off non-suit.

Philip K. Shaner and Curtis H. Gregg, for plaintiff.
Moorhead & Smith and H. Clay Beistel, for defendant.

McConnell, P. J. The thing specially urged in support of this motion, as being a concrete fact that would legally warrant and require the taking off the judgment of non-suit, is thus expressed in the motion: "The Court erred in refusing to admit the testimony of the plaintiff, O. O. Dunlap, and in deciding that he was incompetent as a witness."

The action is an action of trespass against defendant, for the alienation of the affections of plaintiff's wife. Among other things, the statement of the ground of plaintiff's case, alleges,—(and plaintiff sought to sustain the averment, by the introduction of the rejected evidence, that—"heretofore, to wit, on the 4th day of August, 1918, and, on other days and times within one year prior to that day and the day of exhibiting this bill, at Hempfield Township, in the County of Westmoreland, and State of Pennsylvania, wrongfully, wickedly and unjustly debauched, and carnally knew the said Carrie Dunlap, then and there and still being the wife of the said plaintiff, and thereby the affection of the said Carrie Dunlap for the plaintiff was, then and there, alienated and destroyed," &c. &c.

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At the time of the trial, both plaintiff and his wife, Carrie Dunlap, were in full life, and the marital relation had never been terminated by any decree of divorce,—although the plaintiff had left the common habitation, leaving his wife still there. The plaintiff offered himself as a general witness to sustain the basis of action laid in the statement, and, objection to plaintiff's competency as a witness for that purpose, having been made, the objection thereto was sustained by the court. Later, and after plaintiff had called and examined his other witnesses in support of his complaint, the plaintiff was again offered as a witness, which offer was made in the following terms, and with the following result:

"The counsel for the plaintiff now proposes to call O. O. Dunlap to the stand, for the purpose of showing by him as a witness, that prior to the two months before August 4th, 1918, the relations between him and his wife, Carrie Dunlap, were of a pleasant character; that they had no differences, and that so far as he, the witness knew, his wife had great affection for him; that beginning shortly before the 4th of August, 1918, and immediately after August 4th, 1918, this relationship changed, and that the relationship was broken up by reason of the entry of defendant into the home. This, in connection with the testimony already offered in the case, for the purpose of showing that he was required and compelled to withdraw from his home and habitation, and was thus deprived of the love and affection of his wife and deprived of her services as his wife.

Mr. Moorhead: Objected to. The statement of claim charges the wife with infidelity, and the testimony already offered in evidence, which this offer is intended to support, charges the same thing, or is offered for that purpose without any question. The witness is, therefore, incompetent and the testimony cannot be admitted.

By the Court: This is a suit for what, at the common law, was called loss of consortium. It is based on an allegation of infidelity on the part of the wife, and, therefore, the objection that is made to the admission of the husband as a witness to establish any part of the thing that is essential to a recovery is sustained. An exception may be noted."

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Authorities need not be cited to show, that, at the common law, a husband and wife could not be witnesses for, or against each other, and of course, if that rule no longer prevails, it is by reason of its abrogation or modification effected by some Act of Assembly. For many years before the enactment of the present Evidence Act of 1887, it had been provided by statutes in Pennsylvania, that, in effect, husband and wife could be witnesses **for** each other, but not **against** each other.

The Evidence Act of 23rd May 1887, section 5, P. L. 158, later expressly provided, in clause C: "Nor shall husband and wife be **competent, or permitted,** to testify **against each other,** except" &c. &c.

No exception expressed therein, or in any statute enacted since, has undertaken to give competency to them in any suit of this character, whether they were or were not both record-parties to the pending action, therefore, if the plaintiff, within the sense of both the common and the statute law, would be testifying in this case **against his wife**—had his testimony been received,—he would not be under that law, a competent witness.

Although plaintiff's wife was not a party to the suit, and, in that sense, the husband would not be testifying **against** his wife, yet, in the sense of the **law,** he would be testifying against her, if he, by his proffered testimony, supported the charge he makes in his statement against the defendant herein for, to show that charge to be true, against the defendant, his wife must have been a particeps criminis in the commission of the alleged acts of illicit intercourse. The principle of both the common law and the statute law operates on **witnesses**—not solely on parties to suits. They may or or may not be parties to the record in the pending litigation. The principle of exclusion is founded on the policy of law intended to preserve the peace and harmony of the martial relation, which is regarded as a matter of concern to the State, as well as to the parties.

If one spouse, in any suit in which he is called as a witness, be allowed to impute, in his testimony, that specified form of misconduct to the other spouse, that impu-

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tation, when thus obtained, would destroy all martial tranquality, if, up to that time, their relations had been cordial, and, if, those relations had previously become strained, such testimony thus elicited would make reconciliation and a renewal of harmonious domestic relations impossible—and this would be inimical to the welfare of the State at large, as the law conceives.

Judge Thayer, in the case of Sahms v. Brown, 4 C. C., 488, in holding a husband to be an incompetent witness in a suit of this same character, said, inter alia: "It is too clear for argument, that the accused wife has an immense and direct interest in the result of the action. For, let the result of the action be what it may, no woman, with the least respect for herself, could ever again cohabit with a husband who had placed her in such a position."

In a suit of the same character as this one, Cornelius vs. Hambay, 150 Pa., 359, it was held by the Supreme Court, that the husband was not a competent witness—and that, up to that time—(July 13, 1892),—no statute had undertaken to make him competent. Justice Paxson, speaking for the Court, in the case, on page 364, said: "The rule that husband and wife shall not testify against each other, extends, as before observed, to testimony by the one which tends to criminate the other, although not a party to the suit. The reason for it is the disturbance of the martial relations which would result from the admission of such testimony. This is the settled rule of the common law, and it has not been changed by any Act of Assembly, or by any decision in this State. We are of opinion, that it was error to permit the husband to testify in this case. He was an incompetent witness. The issue,and the only issue involved the adultery of his wife. It was not competent for him to forge a single link in the chain of circumstances pointing to his wife's criminal conduct, and upon any other subject his testimony would have been irrelevant."

"On the trial of a man charged with adultery, the husband of the woman with whom the adultery is said to have been committed is not a competent witness for the prose-

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cution." Commonwealth vs. Gordon, 2 Brewster, 569. That was true before the Act of 1887, as well as since.

Therefore, under the circumstances of this case, to have allowed the plaintiff to have testified in support of the charge that defendant had debauched and carnally known plaintiff's wife, and had thereby alienated her affections from her husband, the proposed witness, would have been to allow an incompetent witness to testify "against his wife"—within the true sense of the common and statute law, which forbids his doing so. The statute says he shall "not be permitted" to do so, thereby fortifying the doctrine of legal incompetency, by laying a special mandate on the court, to see to the enforcement of the doctrine, whether objection was made or not. The rule of exclusion is not designed for the benefit of the litigating parties in a pending issue, or for the conservation of any personal rights which are merely of exclusive concern to themselves alone, but it is founded on a rule of public policy, which looks to the welfare of the State, and seeks, for the public good, to preserve and conserve martial harmony, by forbidding one spouse, as a witness, to do that which, by legal presumption, would tend to endanger or destroy it. At the common law, where the martial harmony could not be endangered by the admission of the testimony of one spouse against the other—unless for some reason it was inadmissible—such testimony would be admissible, and it is also, of course, admissible in the special actions and forms of procedure wherein its admission is expressly provided for in the various statutes relating to evidence. The pending kind of case, however, is not one that comes within any common law, or statutory exception to the general rule of public policy, that forbids one spouse to testify against the other,—both spouses, at the time, being in full life, and undivorced. Where one spouse is dead, and the martial relation has been thus terminated, the admission of the testimony of the surviving spouse cannot, in all cases, be excluded on the ground of adverseness coming alone from the martial relation—for, in such a case, there no longer exists any martial relation, that would be in danger of being disturbed thereby, even though the testimony may be of a character adverse to what, if it

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had been given in the lifetime of the now-deceased spouse, would have been held to be testimony "against" him by the other spouse, and, would, therefore, then have been held to be inadmissible. There may be other reasons, growing out of the coverture, that would legally exclude the testimony of the surviving spouse—as for example, that the thing proposed to be thus proven, would be a disclosure of confidential communications obtained exclusively in the privacy of the martial relation when no one else was present—but its mere adverseness, coming from parties to the former martial relation, would not then, alone, warrant its exclusion. The death of one spouse may, therefore, render testimony by the survivor admissible, which, during the life of both, would have been inadmissible—and this for the reason that the domestic harmony to be preserved by the exclusion of the testimony during the existence of the martial relation, is not at all imperiled by its admission after that relation has ceased to exist.

In discussing the provisions of the Act of 1891, P. L. 287, and applying it to the testimony of a surviving wife, Mr. Justice Green, in the case of Dumback vs. Bishop, 183 Pa., at page 609, says this: "The act is, of course, general, and applies to all persons, without any mention of persons affected by the martial relation. It may be concluded that such persons might not be included within the capacitated provisions of the Act, if they were otherwise incapacitated by reason of the special relation. But, on that subject, the authorities are very clear, that the death of one of the parties having dissolved the relation, **only confidential communications, passing between the parties while the relation continued, are excluded.** The Act of 1887 relates **only to living husbands and wives, and makes no provision in case of the** death of either. The clauses b and c of the fifth section are the ones that apply to this relation. Clause c says nothing about it. Hence the general authorities applicable without any reference to the Act of 1887, are the ones that control the present question." He then takes up the authorities held to be applicable without reference to the Act of 1887, and shows therefrom, that a widow may testify in support of a claim of another against her deceased husband's estate, al-

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though she could not have done so in an issue against her living husband, if then called by the same creditor or litigant—because, in that case, she would have been testifying "against her husband," when the Act of 1887, applying to living husbands and wives, had expressly provided that husband and wife should not be competent or permitted to testify against each other. But when death had once dissolved the marriage relation—a thing that the law, during their joint lives, so sedulously sought to protect the harmony of that harmony, could not be any longer endangered by the adverseness involved in the surviving spouse's being a witness, and she, therefore, was then competent to give such testimony—as long as, in doing so, she disclosed no "confidential communications"—which communications, were not to be admissible in the evidence of any spouse, either while both lived, or after one of them had died.

"The competency of a husband and wife to testify adversely to each other, under the Act of May 23, 1887, P. L. 158, applies only to them while their relationship continues, and does not apply to persons between whom the marriage state has ceased to exist." Commonwealth vs. Leisy, 11 Dist. 77. "After the close of the marriage relation, either party may testify to matters which took place during marriage, unless such testimony involves the disclosure of matters of confidence." Jones on Evidence, sec. 737, Cornell v. Vanartsdale, 4 Pa. 363. "The mere fact that Mrs. Stephens was called to testify against the interest of the **estate of her deceased husband** did not make her incompetent. She is competent to testify to facts which came to her knowledge otherwise than through the confidential relations existing between her and her husband. Such were the facts here, and she was, therefore, competent." Stephens v Cotterel, 99 Pa. 188, Per Mercur, J. "The wife, after the death of the husband, is competent to prove facts coming to her knowledge from other sources, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband. She is a competent witness in a suit against her alone on a note signed by herself and her husband, to show that she was a mere surety on the note." Strause v. Braun-

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reuter, 4 Sup., 263. Hood v. Prudential Ins. Co., 22 Sup., 244. But notwithstanding this exceptional limitation to the applicability of the rule that husband and wife may not be permitted to testify against each other,—the rule stands: "The old rule which prevents husband and wife testifying against each other, is not relaxed by either statute or decision." Per Justice Dean in Johnstown vs. Watson, 157 Pa. at p. 456.

Subject to the same limitations against disclosing confidential communications, after the martial relation has been dissolved by means of a decree of divorce, each of the parties to that former relation may, thereafter, testify to any relevant fact against the other, and, in so doing, although both are living, there is no violation of the rule that husband and wife are not permitted to testify "against each other;" they then, no longer, sustain that relation of husband and wife to each other, and there then no longer exists the martial relation, for the protection of the harmony of which, the rule of exclusion originated, or is maintained. The reason of the rule having then passed away, the excluding policy of the law, also passes away, in consequence. "The testimony of a divorced wife is admissible in a suit against her former husband, unless her knowledge as to the facts, in relation to which she testifies, was derived from confidential communications made to her by defendant during coverture, or from her domestic relations with him." Homan v. Homan, 12 W. N. C., 86. "When the marriage relation has been terminated by a divorce, the former h usband is a competent witness against his former wife, to testify to matters as to which his knowledge was not acquired by confidential communications during the martial intercourse." Adams v. Bleakley, 117 Pa. 283.

However, neither spouse, after divorce, would be competent to testify as to **confidential communications.** Brock v. Brock, 116 Pa. 109. Justice Mercur, in that case says, (p. 113): "The plaintiff below was not competent to testify to a matter of a confidential nature which occurred between her and her husband during the existence of their marriage relation, although she was divorced before she testified." While the martial state exists, the protection of

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the harmony and continuance of that relation gives a vitality to the rule of incompetency of one spouse to testify against the other, but when the thing sought to be protected by the rule passes out of existence, through the death of one spouse, or through a divorce, competency, except as to confidential communications, is thereby originated. But as long as the martial relation continues to exist—be the state of that relation harmonious or otherwise—the rule with respect to the incompetency of husband and wife to testify against each other continues to prevail.

Confidential communications may not be disclosed in evidence while the relation exists, nor can they be disclosed by either party to that relation after the relation itself has been dissolved by either death or divorce. With respect to those matters, the law places a perpetual seal on the lips of the parties to the relation, so that they are incompetent to disclose them, at any time, even if, in respect to other relevant matters, they should become legally competent witnesses. The disqualification to divulge confidential communications is, therefore, wider, in the scope of its application than the disqualification arising from the rule that husband and wife may not testify against each other—for the latter disqualification disappears entirely when the marital state ceases to exist, while with respect to confidential communications, the disqualification continues after the relation has terminated.

Speaking of confidential communications, Wigmore on Evidence, Vol. 3, page 3269, sec. 2341, says: "The privilege is intended to secure such a guarantee against apprehension of disclosure, as will induce absolute freedom of communication; and this can only be attained by continuing the protection, in spite of the termination of the marital relation." He then quotes a Georgia case, to this effect: "Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets; and the protection which the law holds over the dead, is the very source of the greatest security to all the living." Our own cases are to the same effect—and this seems to be the law everywhere.

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The author last quoted, in section 2336, says: "It would seem proper to hold that all marital communications are, by implication confidential, and the contrary intention must be made to appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, this implication of confidence seems more consonent with the facts of life. Such is practically the general judicial attitude, in spite of apparent differences. * * * The circumstances which will negative this implication of secrecy, must, of course, vary in the particular carse. Commonly, the presence of a third person within hearing, will negative a marital confidence; so, too, the intended transmission of the communication to a third person. But fixed rules are scarcely possible."

In Brock vs. Brock, 116 Pa., 109, a business transaction between husband and wife is treated as being a confidential comunication; and in Seitz vs. Seitz, 170 Pa., 71, it was held that boastful and insolent declarations of personal misconduct, and of intent to persist therein, made by a husband to his wife, are not such communications as arise from confidence, but rather, from want of it, and are not privileged. In Hintner's Appeal, 54 Pa., 110, a wife was held incompetent to prove cohabitation after execution of separation agreement by which she has waived all interest in her husband's property. Henry on Pa. Pennsylvania Trial Evidence, sec. 411, citing cases, says: "Under the common law rule, reenacted by statutes in Pennsylvania, confidential communications between husband and wife, facts which have come to their knowledge through the marriage relation, cannot be divulged by one, without the consent of the other." The Act of 1887 expressly makes that provision.

What are, and what are not, confidential communications in all cases, is a proposition that defies the skill of any one to give complete and also accurate legal expression to. Bishop on Marriage and Divorce, section 1663, sums up the general rule thus: "All facts which come to the knowledge of either party whereof the disclosure would violate the confidence of the matrimonial relation, especially if prejudicial to the other party, are kept perpetually under the protection of the rule of public policy, to promote freedom and har-

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mony in matrimonial intercourse, forbids their disclosure, in evidence."

The presumption is—unless special circumstances make it to appear otherwise,—that all communications in the privacy of the married state, and all knowledge of facts derived exclusively from the same source—are confidential, and, therefore not to be disclosed at any time, except through other channels than through the testimony of the spouse claiming to have acquired that information in and through the marital relation,—or by the express consent of the spouse against which the spouse testifying gives evidence. Greenleaf on Evidence, Vol 1, section 337, says: "The great object of the rule is to secure domestic happiness, by placing the protecting seal of the law upon all confidential communications between husband and wife, and whatever has come to the knowledge of either, by means of the hallowed confidence which the relation inspires, cannot be afterwards divulged in testimony, even though the other party be no longer living."

The one authority that plaintiff's counsel rely upon to show error in the court in ruling upon the two offers of the plaintiff to testify in the case, is the case of Earhart vs. Bear, 51 Superior Court, 39. The difference between that case and the one trial is obvious in the fact that in that case, there had been a divorce before the trial, and, therefore, the reason for the application of the rule that a husband and wife should not be permitted to testify against each other had passed away; there was then no husband and wife before the court to give testimony against each other, tending to disturb any existing marital state. Competency, except as to confidential communications, had come through the dissolution of the relation, and there was nothing to be endangered by the admission of the testimony of one who had been, but was not then, a party to that former relation. In the case on trial in this court the marital relation was undisturbed by either death or divorce, and there was, therefore, herein a proper basis for the application of the rule.

Because the rule cannot be applied in a case wherein there is no basis for its application is no reason why it should not be applied in another case wherein there is a basis for its application. The case cited carefully guards against even a

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divorced witness disclosing confidential communications—notwithstanding the fact that the marital relation then no longer existed, and he has become competent to testify with respect to other pertinent matters.

The first offer of the plaintiff as a witness, made and rejected, was as a witness to sustain a charge against the defendant that would necessarily have been a charge of the commission of a criminal act by his own wife also. He was not competent for that purpose.

The second offer of him as a witness, in terms, sought to restrict the scope of the proposed evidence to be elicited from the husband. In that second offer, practically the same offer was made as before, but with less boldness, inasmuch as it was covered up by the euphemism of changed manifestation of the degree of affection manifested toward him by his wife, "by reason of the **entry of defendant into the home.**" That was obviously the old offer, covered by vague and elusive words—and being objected to on that account, the offer was rejected. It is to be noticed also, that, coupled with those terms, were mentioned other things about the relations between himself and wife learned only from the privacy of the marital relation, and relating to the cordiality of that relation. If those things were not comprehended under "confidential communications," and, therefore, inadmissible, even if there had been a divorce, it is hard to conceive what "confidential communications" are. He was not at any time competent to disclose things learned only in the privacy of the domestic relation—even if as to other things, he had become a qualified witness. But there was no divorce that would give competency to any testimony against his wife, even with respect to other things than "confidential communications." The offer was subject, therefore, to rejection on both grounds.

There was no error in the Court "in refusing to admit the testimony of the plaintiff, O. O. Dunlap, and in deciding that he was an incompetent witness" and, therefore, the motion to take off the non-suit on that account is denied.

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Settlemoyer vs. Pennsylvania Railroad Company.

Interpretation of Workmen's Compensation Act of 1915, Section 307, paragraph 7. Act of 2 June 1915, P. L. 736.

Paragraph 7 of Section 307 of the Workmen's Compensation Act of 1915, should be interpreted as though it read "If there be neither widow, widower, nor children **entitled to compensation** then to the 'ather and mother" etc.

In the Court of Common Pleas of Westmoreland County, Pennsylvania, No. 651 May Term, 1919. Appeal from order of Workmen's Compensation Board.

Gregg & Gregg, for plaintiff.

Gaither & Whitten, for defendant.

Snyder, J.:—Robert K. Settlemoyer died on the 10th day of August, 1917, as the result of an accident occuring in the course of his employment for the defendant. He left to survive him a widow, with whom he was not living at the time of his death and who was not dependent upon him. He also left to survive him the claimant, his mother. who was dependent upon him at the time of his death.

The sole question before this court is whether the claimant is entitled to compensation under "The Workmen's Compensation Act of 1915." The part of Section 307 of said act applicable to this case is as follows:

"In case of death compensation shall be computed on the following basis and distributed to the following persons: * * * 7. If there be neither widow, widower nor children then to the father and mother, or the survivor of them, if dependent to any extent upon the employe for support at the time of his death, twenty per cent of wages."

It is the contention of the claimant that this Act should be interpreted as though it read: "If there be neither widow, widower nor children **entitled to compensation,** then to the father and mother," etc.

The cardinal principle in the interpretation of statutes is to ascertain and give effect to the intention of the legislature. "The legislative intent is to be followed, although seemingly contrary to the letter." Umholtz License, 191 Pa. 177.

The presumption is that the legislature had a definite

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purpose in every enactment and have adopted and formulated the subsidiary provisions in harmony with that purpose. Consequently, in the interpretation of a statute all the purposes thereof should be construed together and every seeming incongruous part should be so construed as to form one harmonious whole.

"The legislative intent should be ascertained by considering and construing the act as a whole that is, by reading the different paragraphs of the act together." Commonwealth v. Danville, Bessemer Co., 207 Pa. 302.

When the language of a statute is susceptible of two meanings that meaning will be adopted which will not lead to injustice or to unreasonable, absurd consequences. "Where the meaning of the statute is doubtful, the construction most agreeable to reason and justice should be adopted as embodying the intention of the legislature."

"It is an old rule of construction, that if one interpretation would lead to absurdity, the other not, we must adopt the latter; so that interpretaion which leads to the more complete effect, which the legislature had in view, is preferable to another." City of Philadelphia v. Railways Co., 102 Pa. 197.

Where it appears with certainty that certain words have been omitted, the court may supply such words as are necessary to express the legislative intent. "Where the intention of the legislature has been ascertained with reasonable certainty, words may be supplied in the statute in order to give it effect and avoid any repugnancy or inconsistensy with such intention." Orville v. Woodcliffe, 64 N. J. L. 286.

Statutes are construed as best to effectuate the intention of the legislature though such construction may seem contrary to the letter. To discover the intention of the legislature it is often important to ascertain the occasion and necessity of the enactment, the mischief felt and the circumstances and purposes thereof. "Keeping in mind the previous law, the supposed evil and the remedy desired, we must consider the language of the statute and the fair and reasonable import thereof." County of Cumberland vs.

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Boyd, 113 Pa. 56. "A thing within the intention is within the statute though not within the letter; and a thing within the letter is not wtihin the statute unless within the intention." Wilkesbarre vs. Meyers, 113 Pa. 395.

In the application of these familiar elementary principles to the case at bar we are led inevitably to the following conclusions: That it was the intention of the legislature in passing "The Workmen's Compensation Act of 1915" to relieve the hardships and sufferings resulting to the employe or his dependent ones from injuries received by such employe while in the course of his employment. In order to place these benefits within the reach of all the common law defences were taken away, the technicalities as to the admissibility of testimony were removed and the terms describing those to be benefited given the broadest possible meaning. It is plain that the act was intended to have a liberal construction particularly with reference to the persons to be benefited. Furthermore, to construe the act so that one mother would receive the benefits and another just as deserving would not, would render the act absurd, unjust and unreasonable. Certainly such a construction was not within the intention of the legislature, it is not within the act even though it be within the letter.

Many precedents might be cited to sustain this position The Act of April 14, 1851, provides that "hereafter the widow or children of any decedent dying within this commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of Three Hundred ($300.00) Dollars and the same shall not be sold but suffered to remain for the use of the widow and family." Under this Act the Courts have held that the widow has the primary right to take the entire fund to the exclusion of the children, but if there be no widow capable of claiming the provision, the dependent family is not to be deprived of that privilege because there is a widow who is not capable of taking. Henkels Estate, 13 S. C. 337. There are many similiar decisions on statutes relating to the intestate laws of Pennsylvania which might be cited.

So too, the Act of June 13, 1836, provides that a set-

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tlement may be gained by any district "by any unmarried person not having a child who," etc. Under that act our Superior Court decided that a woman whose husband was long since dead and whose only child was married, gained a settlement under that act as unmarried person not having a child. Turbett Township vs. Port Royal Borough, 33 S. C. 520.

Likewise in order to carry out the intention of the law makers the Supreme Court of the United States decided that singing birds were not included in the term "all other living animals." In this case the intention of Congress was ascertained by the Supreme Court not from the act itself, but from the intention manifested in a previous act. Reiche vs. Smythe, 80 U. S. 566. Likewise, the term "single women" has been made by context and manifest intent to include certain married women. 12 Q. B. 681.

It seems clear, therefore, that it was the intention of the legislature that Paragraph 7 of Section 307 should be interpreted as though it read: "If there be neither widow, widower, nor children **entitled to compnsation,** then to the father and mother," etc.

And now, October 27, 1919, the above mentioned appeal is dismissed, the order of the Workmen's Compensation Board is affirmed, and Mary H. Settlemoyer, dependent mother of the deceased, is awarded twenty per cent of $20.00 or $4.00 per week, for a period of 300 weeks from August 24, 1917, together with $100.00, the costs of the last sickness and burial, upon which amount a credit of $40.00 is to be allowed, the said amount having been paid by the defendant.

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GONGAWARE VS. CRAMER, ET AL.

Rule to open confessed judgment on the ground of forgery.—Burden of proof.

When on a rule to open a confessed judgment, the genuineness of the note on which judgment was entered is in dispute and the issue is that of forgery, the writing is not of weight. Its execution is the subject of inquiry, and there is no presumption arising from the writing itself to overcome it. The burden of establishing its genuineness is on the plaintiff in the judgment.

In the Court of Common Pleas of Westmoreland County. Fi. Fa. No. 68 February Term, 1919. Rule to open confessed judgment.

S. W. Bierer, for plaintiff.

Carrol Caruthers, for defendants.

Joseph A. McCurdy, Esq., appointed a Commissioner to take testimony, made report, as follows:

Findings of Fact.

1. On the 21st day of January, 1919, Jacob C. Gongaware, Plaintiff by his attorney, entered judgment, debt $175.00, against Francis Cramer and John Cramer, defendants, at No. 470 February Term, 1919, Common Pleas of Westmoreland County, on a note under seal, containing power of attorney to confess judgment and waivers, etc. On the same day a Fi. Fa. was issued and the Sheriff afterwards made a levy.

2. On 27th January, 1919, on petition of the defendants, the Court granted a rule on the plaintiff to show cause why the said judgment should not be opened and the defendants be permitted to make defense thereto, Liens and levies preserved. On February 6th, 1919, the Plaintiff filed an answer to the rule. On February 10th, 1919, by agreement of counsel for plaintiff and defendants the Court appointed J. A. McCurdy a Commissioner to take the testimony and report the same with an opinion, the testimony so taken shall be considered as if depositions had been regularly taken.

3. The petition for the rule to open the judgment alleges that Francis Cramer, one of the defendants, is a minor under the age of twenty-one years, being of the age of seventeen years at his last birthday and that he is not indebted

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in any way to the plaintiff in the sum of money mentioned in the said judgment, nor in any other sum.

4. The petition further alleges that John Cramer, the other defendant, did not at any time give his note, nor the note herein entered upon which execution has been issued, to the plaintiff. That the signature to the said note purporting to be his signature is not in his handwriting and the same is a forgery. That he is not indebted to the plaintiff.

5. On July 27th, 1919, the time of the alleged signing of the note in question by Francis Cramer, he was a minor, being seventeen years old February 6, 1919.

Opinion.

The names signed to the note in question are Francis Cramer and John Cramer, Clarence Long testified that he went with Francis Cramer to the Gongawares to buy an automobile. Francis paid $50.00 in money and the balance to be paid was $175.00. Francis Cramer and Clarence Long went to the Cramer home with the note in question and Long read the note to Francis Cramer and his father John Cramer and they signed the note. Long was acting as Gongaware's representative to whom he gave the note. Thomas Long, father of Clarence Long, testified that Clarence showed him the note signed by Francis and John Cramer on the 27th of July, 1919, the night he returned from Cramers home and that on the folowing Monday the note was given to Jacob C. Gongaware to whom it belonged. Charles Gongaware corroborates Clarence Long as to the purchase of the auto by Francis Cramer ,his payment of $50.00 and balance of $175.00 to be paid on August 12th, and the taking of the car away.

Francis Cramer and John Cramer, the defendants testified that they did not sign the note in question and that the names on the note are not their signatures. They admi that the night Clarence Long came to their home they signed a paper "to take the responsibility off Gongaware if anything happened while running the machine." That the paper they signed was not the same shape and size as the note in question. Lucy Cramer, mother of Francis and wife of John corroborated them.

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Harry E. Haines and Charles Cramer testified that on January 6th in the presence of Charles Cramer and others in front of Kistler's store at Harrison City, there was talk about the automobile and they heard Clarence Long say there was to be no note. John A. Cramer testified that Clarence Long told him three different times that there was no note given by Francis and John Cramer.

A comparison of the name John Cramer on the note in question with the admitted signatures of John Cramer to the petition for rule and plaintiff's exhibits containing the signature of John Cramer shows quite a similarity in the hand writing and this couples with the testimony of Clarence Long and all the circumstances would indicate that John Cramer signed the note in question. On the other hand his contention that he did not sign the note and that it is not his signature and is a forgery is corroborated by the testimony of his wife, Lucy Cramer, and his sons, Frank Cramer, Charles Cramer and John A. Cramer.

The note in question is crudely prepared. It is not dated. The writing in the body of the note is in ink and the names on the note are written with lead pencil.

As to Francis Cramer the testimony undoubtedly shows that he was a minor at the time the note was signed. The note so far as he is concerned is void.

The question raised by plaintiff's attorney, that there is no testimony to the effect nor is there an allegation in the petition to open the judgment "That the note was not signed by his authority" does not apply in this case. The plaintiff's answer and the evidence for the plaintiff does not mention that the note was signed by authority of John Cramer.

In the case of Jacobosky vs. Zborowjan, 46 Superior Court, page 626, Judge Rice says in his opinion "It has been said repeatedly that there is no inflexible rule which compels the Court to open a judgment entered upon a judgment note where the defendant swears that his signature is a forgery. Even in such case the judge should exercise a sound discretion, after careful consideration of the character and effect of the testimony." The case of Schomaker vs. Dean, 201 Pa., page 439, would seem to support a differ-

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ent doctrine but Judge Rice says "we think that case has been misunderstood."

In the leading case upon the subject of opening judgments, Jenkintown National Bank's Appeal, 124 Pa. page 337, it was held "while the precise measure of proof which should move a chancellor to open a judgment is not laid down, yet he may not act at all unless there is more than oath against oath, and, when there is more than this, and it comes to a question of the weight of the evidence, it is for him to decide to which the scales incline."

"If in doubt upon this question, or as to the credibility of the witnesses, and if the testimony taken would justify a submission to a jury, the court in its discretion may make an order to open and for an issue, but if on the testimony so taken the Court would set aside a verdict for the defendant, the application to open should be refused."

John Cramer, one of the defendants, testified that he never signed the note in judgment and that he was not indebted to plaintiff in any sum of money. He was corroborated by four witnesses. His testimony was contradicted by one witness. The signature to the note is similar to his admitted signature on other papers. The circumstances are in favor of the genuineness of the signature.

In Boyd vs. Kirch, 234 Pa. page 432, it was decided: "When on rule to open a judgment the genuineness on the note on which judgment was entered is in dispute and the issue is that of forgery, the writing is not of weight. Its execution is the subject of inquiry, and there is no presumption arising from the writing itself to overcome it. The burden of establishing its genuineness is on the plaintiff in the judgment." The proofs in the above case are similar to the case at bar. The judgment was opened.

See the following cases of like decision: Feighan vs. Kirch, 231 Pa. 463; Kaier Co. vs. O'Brien, 202 Pa. 153; Shoemaker vs. Dean, 201 Pa. 439; Levy vs. Giligan, 244 Pa. 272.

From the evidence in this case in the light of the above

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cited cases, the Commissioner is of the opinion that the Court should make the rule absolute and order the opening of the judgment for an issue for submission to a jury, and the Commissioner so recommends."

To this report of the Commissioner, exceptions were filed, challenging findings of fact, and also that the Master "erred in holding as a matter of law the testimony showed a legal defense to the said judgment." The exceptions were overruled by the Commissioner.

McConnell, P. J.: And now, 27th September, 1919, upon due consideration, the exceptions to the within report of the Commissioner are all dismissed, and the rule to show cause why the judgment in question should not be opened is made absolute and the same is now opened and defendants permitted to make defense. For the purposes of the trial the note in question shall constitute the plaintiff's statement, and the petition to open the judgment shall constitute the defendant's affidavit of defense, and the answer to the rule, the plaintiff's reply thereto. The case to be tried on the plea of non-assumpsit with leave to each party to offer proof and support of their respective pleadings as herein designated.

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HUGHES vs PARNASSUS BOROUGH

Boroughs—Corporate powers—Birmingham acts.

Every borough incorporated subsequent to April 3, 1851, by an act of the general assemtly, is governed by the general borough law of 1851, P. L. 320, in so far as the same is not in conflict with the local act incorporating such borough.

The borough of Parnassus was incorporated by the act of April 9, 1872, P. L. 1072, the third section of which extends to the borough of Parnassus certain local statutes known as the Birmingham acts. Neither the act of 1872 nor the Birmingham acts contain any provision relative to the supplying of the borough or its inhabitants with water. Certain taxpayers of the borough of Parnassus by bill in equity contended that the borough was without power to construct its own water works. Held, that paragraph 20 of Section 2 of the general borough law is in force in the borough of Parnassus, and that the borough has authority to construct its own water works.

The borough council having authority either to build its own plant or to purchase water from a private concern, and having chosen the former alternative, the court will not question the wisdom of that choice unless there be evidence of bad faith or gross abuse of municipal power.

A borough is not precluded from constructing its own water works from the mere fact that a private water company has been permitted to lay water lines on certain streets and to supply individuals therein with water.

Injunction to restrain borough from erecting water works, C. P. Westmoreland Co., No. 335 Equity Docket.

Williams, Sloan & Griffith, Durbin and Chas. H. McKee, for bill.

Whitten & Scanlon and Gaither and Woods, contra.

McConnell, J. Nov. 4, 1899. — From the testimony in the case the following facts appear:

The borough of Parnassus was incorporated by a special act of assembly approved the ninth day of April, 1872. The first section declares the village of that name to be a borough and authorizes the court of quarter sessions to appoint three persons to define its boundaries and make report to the court. The second section makes it a separate election and school district and the third section provides as follows: "The provisions of the act of incorporation of the borough of Birmingham, in the county of Allegheny and its various supplements, so far as the same may be applicable, are hereby extended to the said borough of Parnassus, except so far as the same may be inconsistent with the provisions of this act; and the burgess and town council duly elected for said borough and their successors in office shall be a body politic and corporate by the name and title of the burgess

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and town council of the borough of Parnassus." The other three sections of the act relate to the election of borough officers—the collection of taxes already assessed on property within the proposed territorial limits of the borough, etc., and the authority of school directors.

We may say here in passing that out of the mode of incorporation grows the principal question of law in this case, viz: Has the borough of Parnassus been given legal power and authority to erect and maintain water works?—it being alleged in the third paragraph of the bill, "That the said borough has the powers conferred upon it by the said act of assembly, and none others, with respect to constructing, maintaining and operating a water works."

On Dec. 29, 1897, an ordinance was adopted by the municipal authorities (see copy attached to complainant's bill marked "Ex. A") declaring it to be the desire of such authorities to increase the present indebtedness of said borough $27,000 over and above the same then was—of which the sum of $17,000 was to be used for the purpose of erecting and constructing a system of water works for the use of the said borough, and $10,000 thereof to be used for the purpose of constructing a system of sewers in said borough. The same ordinance also authorized the holding of an election for the purpose of obtaining the assent of the electors of said borough to this proposed increase of indebtedness.

At the election held pursuant to this ordinance one hundred and sixty votes were cast, of which one hundred and thirty-eight were in favor of the proposed increase of indebtedness and twenty-two were against it. Councicl thereupon adopted an ordinance providing for the construction of water works according to designated plans and specifications—which had been prepared for that purpose—and received and opened bids for such erection and construction. Proper ordinances were also adopted for the issuing of bonds amounting to $17,000 to procure the necessary funds for the erection of the water works and a sale of the bonds at a premium had been negotiated for and agreed upon before the service of the injunction in this case. Water works of the kind pro-

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posed can be erected for $17,000 and their capacity and mode of construction and operation will be adequate for the wants of the present and the immediate future.

At present there is one fire hydrant on the public streets, but is not maintained at public expense. The borough has never had any contract or agreement with any company for the supply of water for the borough. No company has ever obtained the assent of the municipality to the laying of its pipes on the public streets. On what now constitutes public streets of the borough of Parnassus, there are laid about six hundred feet of water pipe on Sixth Avenue, n ine hundred on Fifth, four hundred and fifty feet on Fourth, three hundred on Third and two hundred and eighteen feet on Second. There is also a line of about one thousand seven hundred feet in length connecting the above and other pipes of the same company located in an adjoining municipality and running from the Allegheny Valley Railroad to the Allegheny river. These pipes were laid in 1891, 1892 and afterwards, by the Burrell Water Company. At the time they were laid these streets had not been accepted as public streets of the borough. A portion of the land on which they are now located, then belonged to a certain Mrs. Glass, who laid out a plan of lots thereon. Another portion thereof belonged to one Stephen Young who sold to the Burrell Improvement Company which also laid out a plan of lots thereon, locating the streets and alleys thereof so as to correspond with the proposed streets and alleys of the Glass plan, and the existing streets and alleys of the borough of Parnassus. The Burrell Improvement Company had laid out a plan of lots for the town of New Kensington, which is contiguous to the borough of Parnassus on the north, and as incidental thereto, embraced the portion of the Young tract which lay within the territorial limits of Parnassus.

The Burrell Water Company laid its pipes in the streets of New Kensington and also extended them, as a part of the same system, along the plotted streets of its plan into the borough of Parnassus to the extent indicated above. At the time of so doing the territory was not built up and was

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inclosed in a cultivated field. The plotted streets and alleys had not then been accepted or used as public highways. No municipal assent to the laying of the pipe was asked for or given. Afterwards the streets and alleys were accepted as public highways. Since the such acceptance the pipes have been extended on the streets some three hundred or four hundred feet, but without the assent of the municipality. The territory embraced in the Glass and Young tracts is now built up and some sixty or sixty-five connections for the use of the private consumers within the borough of Parnassus have been made with the water pipes laid as aforesaid and water is now being supplied through them.

The Burrell Water Company was incorporated on July 7, 1890. On the same date letters patent were granted to the Parnassus Water Company whereby the corporation therein named was authorized to supply water to the public in the borough of Parnassus. The articles of association of this latter company, however, were not recorded in the office for recording deeds until Nov. 27, 1893. Prior to that date, to wit: on Jan. 10, 1893, the Parnassus Water Company had made a deed to the Burrel Water Company purporting to transfer to the latter all the franchises and property, real, personal and mixed, of the said Parnassus Water Company. These two normal corporations were conducted by and were in the control of the same people.

R. B. Mellon recovered a judgment against the Burrell Water Company and in execution thereof the sheriff of Westmoreland county levied upon the rights franchises and property of the Burrell Water Company, and, after selling them to the plaintiff in the writ, conveyed the same to him by deed dated the tenth day of September, 1897.

After this judicial sale a reorganization of the Burrell Water Company was effected, pursuant to the provisions of the act of May 25, 1878, and a new corporation known as the the New Kensington Water Company was formed. This new corporation supplies the adjacent boroughs of New Kensington and Arnold with water and is in possession of the pipe laid in the borouogh of Parnassus in 1891, claiming the rights, property and franchises of the Parnassus Water Com-

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pany and the Burrell Water Company by virtue of the deeds and assurances aforesaid. There are about four hundred and fifty houses in the borough of Parnassus, to which water might possibly be supplied by a water company, or by the borough operating its own plant, in addition to that needed for public purposes.

At various times the water company has made to the borough propositions for the supply of water, but it is not claimed or pretended that any of them have ever been accepted. The Kensington Water company has a pumping plant through which it supplies the boroughs of New Kensington and Arnold and this plant is of sufficient capacity to supply all the consumers in the borough of Parnassus, and in addition thereto supply said borough with water for the purposes of fire protection and flushing the sewers.

The weight of the testimony is to the effect that the borough can more economically obtain a supply of water for the borough and its inhabitants by erecting and maintaining a water works at muncipal expense than by purchasing such a supply from an existing water company. We therefore find that the ordinances adopted to secure the erection of such works are not unreasonable and represent a valid exercise of the discretion vested in the municipal legislature of said borough.

Conclusions of Law.

From the foregoing facts we draw the following deductions of law:

1. A borough is presumed to be created for purposes of local self government. The supplying of water to the inhabitants of a borough is not a governmental function, but is a "thing commercial" in its nature.

2. A Municipality, therefore, has no implied power from the mere fact of its creation to engage in the business of supplying its citizens with water for pay. It cannot do so except by virtue of express legislative authority.

3. There is no express legislative authority in the act of 1872—whereby the borough of Parnassus was incorporated—or in the Birmingham acts extended thereto—authorizing said borough to engage in such business.

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4. There is such express authority in the general borough act of April 3, 1851, for all boroughs created by act of assembly of that date, and the borough of Parnassus having been created by act of assembly after that date, is clothed with such authority unless it is divested thereof by the incorporating act of 1872.

5. The incorporating act of 1872, in extending to said borough the Birmingham acts, does not thereby make inapplicable all the provisions of the general borough act of 1851, and particularly does not make inapplicable to said borough the provisions of said act with respect to the power to provide a supply of water for the use of the inhabitants. The exercise of such power by the borough is the exercise of a government function created by statute—and the exercise thereof has entered into such contractual relations with a private water company for the supply of water as would preclude the municipality itself from the exercise of the power.

6. The borough having entered into no contractual relations whatever with any private corporation with respect to that matter, has not, by reason of its relations growing out of contract, precluded itself from exercising its own statutory authority to provide a supply of water.

7. The exclusive right to furnish water to the inhabitants of the borough of Parnassus can only exist in a private corporation by virtue of an express grant of the legislature. Neither the Kensington Water Company nor any of the other water companies whose franchises it claims to possess, was ever the recipient of such a grant.

8. The ordinances adopted by the borough of Parnassus, designed to supply the means of providing a supply of water, are not void because of unreasonableness.

The reasons and authorities which we think justify these conclusions are set out in the following:

OPINION.

The controlling question in this case is whether the borough has authority to construct and maintain water works. That authority is not implied from the mere corporate existence of the municipality. The right of local sovereignty may carry with it an implication of the grant of sovereignty,

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but it will not carry with it an implication of a power to deal with "things commercial." The supplying of water to a borough is not a governmental function but is a mere business one. Prima facie, municipalities are presumed to be created for the exercise of governmental functions and not for the conduct of business: Western Savings Fund Society v. The City of Philadelphia, 31 Pa. 175.

"A municipality has no implied power from the mere fact of its creation to engage in the business of supplying its citizens with water for pay. It cannot do so except by virtue of express legislative authority:" White v. The City of Meadville, 177 Pa. 643.

There is no express legislative authority in the Birmingham act or its supplements conferring the right on the municipality to construct and maintain water works. Therefore when the legislature provided in Section 3 of the act to incorporate the borough of Parnassus that "the provisions of the act of incorporation of the borough of Birmingham, in the county of Allegheny, and its various supplements, so far as the same may be applicable, are hereby extended to the said borough of Parnassus, except so far as the same may be inconsistent with the provisions of this act," it did not thereby give to the borough of Parnassus express authority to construct and maintain water works. If that authority exist it must be found in other legislation. At the time of the approval of the extension of the Birmingham act (April 9, 1872,) the act of April 3, 1851, was in full force. The first section of that act (P. L. 320) provides that "every borough within this commonwealth that hereafter may be incorporated by any act of the general assembly, or by the court of quarter sessions of any county shall have power" to do certain things deemed essential to municipal existence, and the second section provides that "the powers of the corporation shall be vested in the corporate officers designated in the charter and they shall have power * * * to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of the pipes, lamps, reservoirs and other constructions or apparatus and to prevent the waste of water so supplied."

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Parnassus is a borough within the commonwealth incorporated by an act of general assembly after the passage of the act of 1851. Why have its officers not the power, under the foregoing provisions, to provide a supply of water for the inhabitants thereof?

In addition to the provisions already quoted, the legislative intent that the act of April, 1851, shall apply to all boroughs thereafter incorporated, is further manifested in the twenty-second section which reads as follows: "Every borough hereafter incorporated by an act of the general assembly shall, unless otherwise provided, be subject to the provisions of this act." The title of the act is "An act regulating boroughs." In the case of Com. v. Council of Montrose, 52 Pa. 391, it was held that the act did not apply to boroughs incorporated before its passage, without acceptance by such municipalities, but that it was the purpose of the act to form a system for the regulation of boroughs incorporated after its passage. Mr. Justice Strong in the opinion (page 392) says: "In looking at the act of 1851 * * * its purposes appears clearly to form a system of laws for the regulation of boroughs that might be incorporated after the date of its passage. The first section enacts that every borough within this commonwealth that hereafter (thereafter) may be incorporated by an act of general assembly or by the court of quarter sessions of any county shall have certain powers, describing them. The section continues the description, and prescribes in whom the powers shall be vested." After considering the terms of certain paragraphs of the act, the opinion continues: "Thus far every provision undoubtedly refers to no other boroughs than those mentioned in the first section, to wit: those that might be incorporated after the passage of the act * * * It is thus obvious that the entire subject-matter of the legislation is boroughs incorporated after April 3, 1851." Of course the question involved in that case would not make it an authority which would necessarily control this one, but the opinion contains a statement of the purpose of the act which we think might be taken for granted here. It seems to us just as manifest that the general assembly of 1851 intended that the provisions of the act of that year should apply to the borough

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of Parnassus, as it is manifest that the general assembly of 1872 intended that the Birmingham act should apply to it. Both have expressed the same intent with completeness and precision—that of 1872 has named the borough of Parnassus but that of 1851 has designated it, with equal certainty, by a description of it.

Is there anything to prevent this expressed intent of the Act of 1851 from taking effect?

It is said that because the general assembly of 1872 specifically provided that the Birmingham act should apply that this expression is necessarily the exclusion of the application of the general borough act. If this follows, it must be by implication, for no expression justifies the conclusion. The application of the act of 1851 does not depend upon implication, but upon direct expression, and if it is in that regard repealed by implication it must be by reason of repugnancy to the later act.

If consistent, there is no implied repeal. "Where a later statute is absolutely repugnant to the former one only in part, it repeals the former one only so far as the repugnancy extends and leaves all the remainder in force:" In re-Contested Election of Barber, 86 Pa. 392. Where a borough incorporated before the act of 1851 was passed, accept the act of 1851, the provisions of the former chapter are not annulled unless in conflict with the general borough act: Borough of Warren vs. Greer, 117 Pa. 207; O'Maley v. Borough of Freeport, 96 Pa. 24; Trickett on Boroughs, 4.

It does not follow that because the act of 1851 has been made to apply, that that fact alone makes some former act to be thereafter wholly inapplicable. It is inapplicable insofar as it is repugnant with the later statute and only to that extent.

The act of 1851 provides that boroughs of the description of Parnassus shall have power to provide a supply of water for the use of the inhabitants and to prevent the waste of water so supplied. The act of 1872, and the Birmingham acts thereby extended to the borough of Parnassus, contain no repugnant provision to that of the act of 1851, in this regard. Therefore the act of 1872 is not in this regard a repeal of the act of 1851. The application of the act of

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1851 depends solely on its own terms, but the application of the Birmingham acts depends solely upon the terms of the act of 1872. It was necessary to say in the act of 1872 that the Birmingham acts should apply—for there was no previous declaration of the legislature to that effect, but it was not necessary to say therein that the act of 1851 should apply because that had already been done. Therefore the expression in the act of 1872 of all that was necessary to compass a result that would leave both applicable cannot be an implied declaration that only the latter is applicable. It is rather an implied declaration that both shall apply, except in respects wherein they are from their nature irreconcilable. The twenty-second section of the act of 1851 says, "every borough hereafter incorporated by an act of the general assembly shall unless otherwise provided, be subject to the provisions of this act." It is not a strained construction of the clause "unless otherwise provided" to hold that it means "unless otherwise expressly provided" for an implication can hardly be said to fill the sense of the word provision, i. e., "a foreseeing." An implication of repeal generally results from a not seeing. This construction is further strengthened by the fact that in the same sentence in which this clause is used the "provisions of this act" (which are express) are referred to. The word having been used by the legislature in the one place in the act in the sense of express provision, it is probably used by it in both places in the same sense. There is no express provision making the act of 1851 inapplicable. It should be as obviously made inapplicable by the act of 1872 as it is obviously made applicable by its own terms, otherwise it remains in force except in respect wherein it is irreconcilably inconsistent with the act of 1872.

"An earlier statute is repealed by a subsequent one only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment. The leaning of all courts is against repealing the positive provisions of former statutes by construction, unless there be such a manifest and total repugnance between the two enactments that they cannot both stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different

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acts on the same specific subject." Com. v. De Camp, 177 Pa. 112. On the specific subject of the power of the borough to erect and maintain water works there is no conflict between the acts of 1872 and 1851. The act of 1851 provides that the borough has such power. That provision prevails. This disposes of the substantial question at issue.

It was alleged but not seriously argued that in some way the Kensington Water Company had the exclusive right to supply water to the inhabitants of Parnassus.

This we think cannot be true.

First. Because the borough never divested itself by any contract with said company or by any encouragement given to it of the right to construct and maintain water works at municipal expense.

Second. Because the only legislative grant to a private corporation of the right to supply water to the inhabitants of said borough was to the Parnassus Water Company, whose franchises the Kensington Water Company now claims to hold through a deed dated Jan. 10, 1893, and the Parnassus Water Company's franchises and its corporate existence did not then exist, for the reason that under the law they bear date from the recording of the charter in the county where its chief operations are to be carried on—and this recording did not take place until Nov. 27, 1893. On Nov. 27, 1893, an exclusive right could not vest in the corporation for the reason that the act of June 2, 1887 (P. L. 310), was then in full force and it so amended the corporation act of 1874, that water companies created thereunder do not secure exclusive franchises.

And Third. Because at the date of the letters-patent of the Parnassus Water Company (July 7, 1890), there was no law which gave it to an exclusive franchise nor has any statute since that date given it or its successors such franchises.

All these propositions are sustained by the cases of Centre Hall Water Co. v. The Borough of Centre Hall, 186 Pa. 74; Braddock Borough v. Penn Water Co., 189 Pa. 379, and Luzerne Water Co. v. Toby Creek Water Co., 148 Pa. 568.

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We think that the exclusive right claimed must rest on express grant from the commonwealth. Such grant has never been made. The right does not exist.

It is also claimed that the ordinances in relation to the construction of water works should be stricken down as unreasonable, because, if it be admitted that the borough has authority to provide water for the public purposes of fire protection and flushing the sewers, it can procure the same from the Kensington Water Company at less cost, and without incurring the burdens necessary under the plan proposed by the borough.

The borough can legally employ either of the two methods referred to under the provisions of the act of 1851. The mere expediency of the choice made is not a matter with which this court can deal. It is the discretion of the municipal legislation that has legal authority to operate on such quesions.

"Where the municipal legislature has authority to act it must be governed, not by our discretion, but by its own, and we shall not be hasty of convicting them of being unreasonable while in the exercise of it:" Fisher v. Harrisburg, 2 Grant, 291.

But were it otherwise, the evidence in the case convinces us that the council in this case has not only acted unreasonably and oppressively, but it has acted wisely in the enactment of the ordinances complained of. There is no such abuse of discretion as would warrant this court to declare that the ordinances are unreasonable and therefore void. The weight of the testimony is to the effect that the mode proposed by council is more economical than that proposed by the Kensington Water Company.

We therefore enter the following.

DECREE.

AND NOW, Nov. 4, 1899, this case having come on for hearing on bill, answer and testimony, upon due consideration thereof by the court, after previous argument by counsel, it is adjudged and decreed that the preliminary injunction, which was continued till final hearing, be now dissolved and that the bill be dismissed and that the complainants pay the legal costs which have accrued in the case.

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JOHNSON VS. PRY.

Equity-Specific performance. Indefinite description. Contracts—Construction by the parties.

Where in a bill for the specific performance of a contract for the sale of real estate, the only reference to the land which the plaintiff sought to have conveyed was as follows: "This agreement applies to the property of the Pittsburg Portland Cement Company, etc. * * * All of the above applies and concerns property of the Pittsburg Portland Cement Company aforesaid, located in Sewickley Township, Westmoreland County, State of Pennsylvania," on demurrer to the bill on the ground that the contract did not sufficiently identify the land to be conveyed, it was held: That the contract sufficiently identified the property to be conveyed.

In the case of ambiguity in the terms of a contract, the Court will endeavor to give a construction that is fair and equitable to the parties rather than one that would be absurd or work an injustice. In such cases the Court ordinarily follows the construction put upon it by the parties themselves.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. Sitting in Equity. No. 1019 Equity Docket. Demurrer to bill for specific performance.

Gaither & Whitten, for plaintiff.

John E. Kunkle and C. C. Walthour, for defendants.

Snyder, J.: This case comes before the court on a demurrer to a bill in equity. The plaintiff therein seeks to compel specific performance of a contract relative to the sale of real estate.

Three distinct questions are raised by the demurrer. The first is, whether the contract upon which the bill for specific performance is based identifies the land to be conveyed.

In the written contract the only reference to the land which plaintiff seeks to have conveyed is as follows: "This agreement applies to the property of the Pittsburg Portland Cement Company, etc ******. All of the above applies and concerns property of the Pittsburg Portland Cement Company aforesaid, located in Sewickley Township, Westmoreland County, State of Pennsylvania."

Under the statute of frauds the lands to be conveyed must be so described in the agreement as to be capable of identification. A technical description is not essential. It is sufficient if the description points unmistakably to the spe-

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cific property. "The land must be described in the agreement or by reference to a plan or other matter so that it can be identified and located, and the description must be sufficiently definite within itself and not require the aid of parol testimony or be left to the future action of the same or other parties." Safe Deposit & Trust Co., vs. Coal & Coke Co., 234 Penna., 108.

Is the land in this contract so described? Is the specific property so identified in this agreement that an intelligent person, with the contract in his hand, can identify it with certainty.

The defendants earnestly contend that it is not so described and rely upon the decision in the case of Byron vs. Miller, 844 Equity, Westmoreland County. In that case the contract called for the conveyance of six acres of coal located somewhere within the boundaries of a tract of land containing 57 acres. The 57 acres were properly described, but there was nothing in the contract to indicate in which part of the larger tract the six acres of coal were located.

In that case the learned Court, in a very able and exhaustive opinion, decided that the description was insufficient under the statute of frauds. So too in the case of Barnes vs. Rhea, 219 Penna., 287, the contract called for 39 acres, more or less, of coal underlying a certain tract of land in Cumberland Township, Greene County, Penna., without calling the tract by any name or giving any adjoining owners or fixing any natural boundaries, etc. In that case the Supreme Court decided "That the agreement lacks the certainty necessary to identify and locate the land as a whole." From this description it was impossible to determine which tract of 39 acres in Cumberland Township the defendant agreed to convey.

In neither of the foregoing cases could the tract described be definitely located from the agreement. But these cases are not analogous to the case at bar. Our contract calls for all of the land of the Pittsburg Portland Cement Company in Sewickley Township.

On the other hand, the plaintiff argues that this case is ruled by the decision in Henry vs. Black, 210 Penna., 245 and kindred cases. In the last named case a receipt in writing, designated the property to be conveyed as the Hotel Du-

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quesne property. The Supreme Court decided that this was a sufficient memorandum in writing under the statute of frauds. The name of the hotel, fixing its site and the city and county records establish the boundaries and quantity of land. The name "Hotel Duquesne" identifies the property, just as definitely as the name "Adam Smith" identifies the party of the first part. It is the local appellation of a particular place. Its location is well known. It has definite boundaries. But in the case at bar we have no commonly accepted name and no monument or boundaries to aid in identifying the land. All we do have is, that it is the property of the Pittsburg Portland Cement Company in Sewickly Township. So far as the agreement is concerned, it might consist of many tracts of land of various shapes and sizes. It might be one acre or many hundreds of acres. However, had the agreement designated this property as the Pittsburg Portland Cement Company in Sewickley Township, the case of Henry vs. Black supra, would be strictly in point. But the description—a farm belonging to the Pittsburg Portland Cement Company in Sewickley Township, points just as definitely and certainly to a specific property as does the appellation "The Pittsburg Portland Cement Company farm," or the "Hotel Duquesne Property." If a technical description can be obtained from the proper records in the latter case a fortiori it can be so obtained in the former. Indeed, it might be that the person who undertook to sell the Hotel Duquesne property was not the owner thereof and much difficulty might be experienced in obtaining an adequate description. Where the name of the owner is given the description can surely be obtained much more readily. Had our contract then merely described the property as a certain tract of land in Sewickley Township belonging to the Pittsburg Portland Cement Company, this would furnish a sufficient means of identification that the purchaser of such tract might ascertain the boundaries, provided the Pittsburg Portland Cement Company owned but one tract of land in Sewickley township.

In Harrigan vs. Dodge (Mass.) 86 N. E., 780, the Supreme Court of Massachusetts held "That a receipt for money paid on account of sale of three houses belonging to the

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Frances Dodge Estate of Danvers, signed by the agents of the defendant, and another receipt signed by the defendant for money received on account of a sale of three houses and land that rightfully belongs thereto, in Danvers, belonging to the Dodge Estate, are sufficient memoranda under the statute of frauds, if the three houses and the land was the only real estate owned by the Frances Dodge Estate in Davers; but, if it appears that such Estate owned more than three houses in Danvers, then the description contained is not sufficient to satisfy the statute."

In Waring vs. Ayres, 40 N. Y,, 357, the Supreme Court said "The description is two lots owned by me in 116th street, New York, between 8th and 9th Avenues, said lots being 25 feet front by about 75 feet deep. Now, if no other lots will answer that description, there is no want of certainty in respect to the subject that is the property to be conveyed, etc."

"Land may be identified by a statement of the vendor's ownership if the evidence shows that the vendor owns only one tract, which answers to the rest of the description. 36 CYC, 594.

In White vs. Green, 106 Ala., 159, the description in the agreement was—three lots in Sheffield, Ala., belonging to Albert Green, viz: the one located on Montgomery Avenue and the second on Annapolis Avenue. The proof was that Green then owned no other property in Sheffield than the lots in question. This was held sufficient description.

In the last mentioned case the number of lots to be conveyed are specified in the agreement. In our case the contract does not designate how many tracts of land there are, but if three or more tracts of land can be so identified, in case there be no other land answering to that description, then it would seem clear that a description which includes all the tracts belonging to a specified party can likewise be identified in this way. Certainly it is just as easy to identify property intended to be conveyed from a contract setting forth the "property owned by the vendor" as the two tracts of land owned by the vendor, providing the two tracts were all he owned in either case.

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"If the vendor contracts to convey an undivided one-third of all his realty, no further description is necessary. Page on Contracts, 1057.

"The contract to convey the one-third of all one's estate of whatever nature acquired by him under his mother's will, or otherwise now owned by him, sufficiently described the property, as it may be identified by parol evidence to satisfy the statute of frauds." Moayon vs. Moayon, 72 S. W., 33.

The description in the agreement set forth in the bill of complaint would therefore seem to be sufficient to identify the properties intended to be conveyed.

The first reason for the demurrer is therefore not well founded.

The second ground for demurred urged by the defendants is, that under the contract it was incumbent upon the plaintiff to install a plant for the production of marketable limestone, etc., upon the premises therein described before it became obligatory upon the defendant to make delivery of said deed. There is no averment or claim that such plant has been installed.

> The contract provided: "In the event of acceptance of this agreement the parties of the second part shall deliver to the party of the first part a deed for the property, real and personal, free from all encumbrances, except for the $30,000.00 in bonds aforesaid."

The primary rule in the construction of a contract is to ascertain the intention of the parties as expressed in the words which they have voluntarily employed. This intention must be collected, not from detached parts of the instrument, but from the whole of it.

"The problem is not what the separate parts of the contract means, but what the contract means when considered as a whole. The contract must be thus construed even if the separate parts are clear and free from ambiguity." Page on Contracts, 1732.

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The learned counsel for the defendants argues that the time for the delivery of the deed is stipulated in the third paragraph of said contract. This paragraph provides: "It is hereby agreed that in the event of certain arrangements to be consummated by the said party of the first part, as hereinafter specified, that the parties of the second part hereby agree to accept in lieu of our sales, as aforesaid ($5,000.00 of the said bonds being cancelled), the remaining Thirty Thousand dollars in bonds, free from interest, except as provided for as follows:

"The party of the first part agrees to install a plant for the production of marketable limestone, etc."

The arrangements to be consummated clearly refer to the installation of the plant and the payment of the bonds. In no way does this paragraph aid in determining the time for the delivery of the deed, nor can we discover anything that would indicate that it was the intention of the parties that the delivery of the deed should precede the installation of the plant. It is agreed by counsel that the agreement was accepted at the time it was signed. The most liberal interpretation of the paragraph first quoted would be that the delivery of the deed was contingent upon the acceptance, but that the time for doing so was not designated therein. Under such circumstances the defendants would have a reasonable time for the fulfillment of this part of the contract.

"Where a contract is silent as to the time within which the act is to be performed, the implication is that it is to be done within a reasonable time." Shepler vs. Scott, 85 Penna., 329.

But assuming that the terms of the contract are ambiguous and uncertain there is another cogent reason for the foregoing construction. The parties themselves have so construed it.

In a receipt given by an attorney for the defendant on the 7th day of December, 1916, we find the following: "It being the intention of the parties to the agreement dated September 16, 1915, that the said A. F. Johnston shall pro-

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ceed to install the plant and machinery as mentioned in the said agreement, and that the said S. J. Lyle and his associates **shall proceed at once** to procure the execution of the necessary papers to complete the contract."

Had there been any ambiguity in the original contract, the parties themselves have construed it to mean that the deed was to be made and delivered at once.

Where ambiguity exists the courts will ordinarily follow the contruction put upon the instrument by the parties themselves.

> "Where the parties to a contract have given it a practical construction by their conduct, as by acts of partial performance, such construction is entitled to great, if not controlling weight, in determining its proper interpretation, particularly where such interpretation is agreed on before any controversy has arisen." 13 Corpus Juris, 546.
>
> "When we are asked to say what the parties meant or intended by their contract, it is entirely safe to point to their own construction of it as evidenced by their course of dealing under it. Peoples Natural Gas Co. vs. Braddock, 155, Pa., 22.
>
> Furthermore, in case of ambiguity, the Court will endeavor to give a construction that is fair and equitable to the parties rather than one that would be absurd or work injustice.
>
> "The Court will likewise endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other, so their interpretation which involves the more reasonable and probable contract should be adopted and the construction leading to an absurd result should be avoided." 13 Corpus Juris, 540.

As between two constructions, one of which makes the contract fair and reasonable and the other of which makes

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it unfair and unreasonable, the former should always be preferred." Page on Contracts, 1742.

In the case at bar the defendants urged an interpretation of the contract that would compel the plaintiff to construct expensive buildings on the land of a third party.

Even now the defendants question whether a deed could be obtained. Certainly no intelligent business man could have entered into such a contract, and no court ought to give the contract such an absurd inequitable interpretation. On the other hand, if the delivery of the deed preceded the installation of the plant the defendants will hold their bonds as security for the payment of the purchase money. Such a construction would seem fair and equitable to both parties. It is therefore the opinion of the Court that a fair interpretation of the contract would be that the deed was to be delivered within a reasonable time after the agreement was accepted.

The third ground for demurrer is that it appears from plaintiff's bill of complaint that defendants are not the owners of the premises therein described and that by virtue of this fact the plaintiff is not entitled to a decree of specific performance. This may or may not be the case, depending upon circumstances. It becomes a question of fact to be determined on the trial of the case.

AND NOW, November 15th, 1919, the demurrer is overruled and the defendants asked to answer within ten days from the date hereof as per rule of court.

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HARRISON AND COMPANY'S APPEAL

Assessment of personal property for taxation, steamshovels etc.

Steamshovels, moveable shanties, and other personal property used in stripping and mining coal, and which are moved from time to time and from place to place, as the circumstances may require in such mining operations, are personal property and are not subject to taxation as real-estate.

In the Court of Common Pleas of Westmoreland County No. 487 May Term, 1919. Appeal from the decision of the Board of Revision of Taxes of Westmoreland County.

Lewis C. Walkinshaw for Appellant.

William S. Rial, County Solicitor.

SNYDER, J.,

The Appellant in this case is the owner of two steam shovels, some moveable shanties, tanks, tipple and a shop in Derry Township. None of this property is in any way attached to the real estate. At present it is used in stripping and mining coal and is moved from place to place, even from one part of the country to another, as the circumstances may warrant. It is conceded that all this property is personal property.

The only question before the Court is whether it is taxable. It is a well settled principle of law that all authority for the assessment of taxes against any particular kind of property comes from the legislature. In order to justify the taxation of any property there must be legislative authority therefor. In accordance with this principle of law, the legislature has authorized the taxation of certain kinds of personal property, such as horses, cows, etc.

Steam shovels, shanties used as above set forth, etc., are not included in this category. Consequently they are not then subject of taxation. On the same principle the Courts have decided that mining machines are not then subject of taxation. Irwin Bason Coal Lands, 17 D. R. 825. A portable saw mill is not taxable: 1 Monaghan 344.

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Likewise "derricks, engines, boiler houses and other personal property, being such as is used in connection with the business of drilling for and producing oil and are so used by plaintiff * * * they are no more real estate than a steam thrashing machine which is hauled around the country doing thrashing for farmers, or a portable saw mill which is carried from forest to forest to do its work as expediency requires. They do not fall within the list of personal property matter taxable by the Act of 1834 or the Act of May 8, 1854 in relation to the assessment of school taxes and therefore are not subjects for county taxation or township taxation for road or school purposes."

Mellons v. Allegheny Co., 3 D. R. 422.

It has been suggested that this appellant is a foreign corporation and that, therefore, a different law is applicable. However, we have not been referred to any such different law and can find none.

And now, December 27, 1919, it is ordered, adjudged and decreed that the forgoing personal property, to wit, 8 shanties, valued at $800.00, tipple, tanks and shop, valued at $750.00, steam shovel, valued at $20,000.00 be stricken from the assessment book of the Commissioners of Westmoreland County, Pennsylvania.

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MATTHEWS ET. AL. VS. RUSH ET. AL.

Costs of appeal to Supreme Court and costs of paper book. Act of 15 April, 1907, P. L. 83.

Where in an appeal from the decision of the Prothonotary taxing the costs of an appeal to the Supreme Court and the costs of the paper book, it appeared that a judgment in favor of the plaintiffs in the Court of Common Pleas was affirmed in the Supreme Court on the appeal of the plaintiffs. It was held, that notwithstanding the fact that the plaintiffs had appealed to the Supreme Court, the assignments of error were overruled and the judgment of the Court of Common Pleas affirmed, the plaintiffs were entitled to the costs of appeal and the costs of printing the plaintiff's paper book.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 273 August Term, 1917. Apeal from taxation of costs.

John E. Kunkle, attorney for plaintiffs.

Gaither & Whitten, attorneys for defendants.

Snyder, J.:—The plaintiffs in this case recovered a verdict against the defendant in the Court of Common Pleas of Westmoreland County in the sum of $2201.19. The defendants were apparently satisfied with this verdict. The plaintiffs appealed to the Supreme Court. In that court all the assignments of error were overruled and the judgment of the Court of Common Pleas affirmed. In taxing the costs the Prothonotary disallowed the claim of the plaintiffs for the cost of this appeal, including the cost of printing plaintiff's paper book. An appeal was taken from the decision of the Prothonotary.

The sole question now before this court is whether the plaintiffs are entitled to these costs. The Act of 1907 P. L. 83 provides:

"In all cases * * * where an appeal is taken from any judgment to the Supreme Court * * * the party in whose favor the final decision is rendered shall be entitled to charge and collect from the losing party as part of the costs such amount as shall have been expended for printing paper books upon said appeal."

This case, therefore, turns upon the construction of the words: "the party in whose favor the final decision is rendered." The defendants contend that this means the final

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decision in the appellate c ourts. However, we think this question has been frequently decided by our Superior Court.

In Henning vs. Keifer, 43 Pa. S. C. 177 the judgment in the lower court was for treble damages. Upon an appeal the assignments of error were sustained and the record remitted with instructions to enter judgment for the actual damages as found b ythe jury. The judgment in the Superior Court was, therefore, in favor of the appellant and yet the appellant was not permitted to collect the costs of the paper book because the final decision, namely, the judgment in the Court of Common Pleas, was not in his favor.

"Notwithstanding the fact that the defendant succeeded in reducing the amount of the judgment, he was, nevertheless, the losing party, just as the defendant on an appeal from the judgment of a justice of the peace is the unsuccessful party if judgment be obtained against him in the Court of Common Pleas though for a less amount." Henning vs. Keifer, 43 Pa. S. C. 177.

In that case the defendant was the successful party in the appellate court, nevertheless, he was the losing party tested by the state of the record in the court below.

"The words 'finally losing the cause' in the act of 1897 and 'final decision' in the act of 1907, refer to the state of the record **of the court in which the case is tried, which puts an end to the action; when no further question is reserved for future determination except such as may be necessary to carry the final judgment into effect.** As a general rule a judgment is not considered a final one which settles only a part of several issues of fact."

Penna. Co. vs. Wallace, 44 Pa. S. C. 64. Those decisions were quoted with approval in Knowler vs. Everett Realty Co., 65 Pa. S. C. 169, likewise the exact point was decided in Coyne vs. Lackawanna Co., 23 D. R. 73.

In the case at bar the defendants were the victors in the particular question raised on the appeal but the plaintiff got the final decision in their favor. On account of the manifest injustice the court is loath to follow these decisions to their ultimate conclusion. However, there seems to be no portal of escape. It is not within the province of the court to change the law.

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A similar hardship resulted in the construction of the act of 1833 relative to costs on an appeal from a justice of the peace. The act provides:

"The costs on appeals hereafter entered from the judgment of justices of the peace and alderman shall abide the event of the suit, and be paid by the unsuccessful party as in other cases."

Under this act a plaintiff may recover a much smaller sum on an appeal from the judgment of a justice of the peace and yet recover costs.

Knappenberger vs. Roth, 153 Pa. 614.
King vs. Bayles, 31 Pa. 424.

Under all these decisions the court is compelled to conclude that the plaintiffs in this case are the parties in whose favor the final decision was rendered and are, therefore, entitled to charge and collect from the defendants as part of the costs such amount as was expended for printing their paper book on said appeal.

The right to tax the other costs in the case does not seem to be questioned.

And now, December 15th, 1919, the assignments of error are sustained and the Prothonotary is directed to tax the costs in accordance with this opinion.

SAM VS. CZEPULL.

Justices of the Peace—Certiorari and Appeals.

Where pending an appeal from a judgment of a Justice of the Peace, the defendant also sues ou a writ of certiorari, on motion the writ of certiorari will be quashed.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 763 August Term, 1919. Ceritorari,

The defendant in error filed a motion to quash and assigned the following reasons therefor:

"1.—The record returned by the said John B. Hagerman, J. P., to the said writ of certiorari shows that an appeal was taken by this defendant from the decision or judgment

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of the said Justice of the Peace and the appeal perfected by the payment of costs and entry of bail August 13, 1919.

2.—That the appeal thus taken was filed in this Court Aug. 19, 1919, at No. 766 August Term, 1919.

3.—That the certiorari to bring up the record in this case was issued Aug. 19, 1919.

4.—That the defendant cannot have both an appeal and a certiorari to a Justice's judgment at one and the same time, and the appeal having been taken first and then filed in Court, the Court is asked to quash the certiorari."

H. Clay Beistel, attorney for Plaintiff in Error.

B. R. Kline and John E. Kunkle, attorneys for Defendant in Error.

McConnell, P. J.: On the 13th of August, 1919, the defendant took an appeal and on the 19th of August, filed the same in the Court of Common Pleas at No. 766 August Term, 1919, and the same is still pending. She also sued out the present certiorari. She is not entitled to both an appeal and a certiorari, and accordingly on motion, the writ of certiorari is quashed.

WOLF VS. HAWKINS.

Affidavit of Defense raising question of law.—Act of 14 May, 1915, P. L. 483, Section 20.—Trespass for mental pain and suffering.

No cause of action arises for the recovery of damages in trespass for mental pain and suffering alleged to be incident to words uttered by a defendant, no assault and battery or other mode of producing physical harm having been alleged.

Under Section 20 of the Practice Act of 14 May, 1915, P. L. 483, the Court is given authority in a case so circumstanced to enter judgment generally in favor of the defendant.

In the Court of Common Pleas of Westmoreland County, Pennsylvania.. No. 227 Nov. Term, 1919. Trespass for the recovery of damages for mental pain, suffering and anguish.

The defendant in this Affidavit of Defense raised the following question of law:

"FIRST: Without answering any of the averments of

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fact in the statement of claim, though formally denying the same, he is advised and believes that nothing therein contained by reason of the question of law involved entitles the plaintiff to recover in this action.

SECOND: That the question of law, as he is advised, arising out of the facts stated in the statement of claim, is that no personal injury or violence of any kind was at the time stated inflcted by the defendant upon the plaintiff and that, therefore, she is not entitled to recover anything from him in this action.

All of which is respectfully submitted for the decision of the Court in accordance with Sections 4 and 20 of the Statute, approved 14th May, 1915, P. M. page 483."

Bell & Bell, for plaintiff.

Moorhead & Smith, for defendant.

McConnell, P. J.: The plaintiff's cause of action as disclosed by the statement is for the recovery of damages in trespass on a case for mental pain and suffering alleged to be incident to words uttered by defendant. No assault and battery or other mode of producing any physical harm is alleged. That such a statement discloses no legal cause of action is shown by many caes: Ewing vs. Railroad Co., 147 Pa. 40; Simm vs. Duquesne Boro., 204 Pa. 551; Houston vs. Freemansburg Boro, 212 Pa. 548; Maurice vs. Railroad Co., 228 Pa. 198.

Under Section 20 o fthe Practice Act of 14 May, 1915, the Court is given authority in a case so circumstanced to enter judgment generally in favor of the defendant and it is accordingly now so done.

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DESUIAN V. ZEFCAK

Capias in slander—Arrest of freeholder — Abatement of writ—Common bail.

A capias against a freeholder will be quashed if application be made within reasonable time. Such capias will be quashed even though the defendant has entered bail to the actio non arrest, and the entry of bail is not a waiver of his right to have the writ abated.

Rule to abate capias in slander. C. P. Westmoreland Co. Nov. T. 1898, No. 46.

N. A. Cort, for writ;

Spiegel & McGeary, for rule.

McCONNELL, J., Jan. 19, 1899.—On the first day of September, 1898, plaintiff sued out a writ of capias ad respondendum in slander. On Sept. 19, 1898, defendant made application that the writ be abated on the ground that he is a freeholder, an owner of unencumbered real estate within the county of above, the value of fifty pounds. This is not disputed by the plaintiff in his answer to the rule. The defendant, at the time of his arrest, gave bail. Under these circumstances is he entitled to an abatement of the writ? "A capias against a freeholder will be quashed if he apply before the expiration of the quarto die post:" Blackstone v. Potts, 2 Miles, 388; Buckman v. Jones, 3 W. N. C. 302. "A capias against a freeholder will be quashed if the application be made within a reasonable time, though after the quarto die post:" Ingersoll v. Campbell, 10 W. N. C. 553. "A defendant who is arrested on a capias and who desires to avail himself of the exemption from arrest because he is a freeholder must make his application before the expiration of the term to which the writ was issued. It was held that a delay of three years was fatal: Gottschall v. Reinhart, 9 Pa. C. C. 415.

The foregoing authorities show that no precise period is fixed by the law within which a defendant is bound to plead his privilege of freedom from arrest, but they concur in this, that he may do so within a reasonable time. We think the defendant in this case has claimed his right within a reasonable time. The writ was not returnable until the November Term. It was issued on the first of September, and defendant was arrested, possibly, on the 14th of September. On

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the 19th of the same month this application was made. The only question remaining is whether by giving bail to the sheriff he has waived his right.

It must be kept in mind that this is an action of slander. It has been held that special bail is only demandable where special damage is shown, or the defendant is about to go out of the jurisdiction of the court: Scott v. Crum, 1 Pears. 196,

"In slander bail is not demandable of course, but the court will hold to bail if the plaintiffs swear positively to special damage, although the amount of damage be not specified. But the court will uniformly discharge the defendant in slander on common bail unless special damage be alleged, or the words charge the plaintiff with a crime of gross nature:" 1 T. & H. Prac. 172, Sec. 301. The affidavit filed in this case does not set up either of these two things. The defendant would therefore at least be entitled to discharge on common bail. But the question we have to dispose of here is not whether he may be discharged on common bail but whether the writ should be abated because it was unlawful to issue it against a freeholder. The act provides that if any freeholder exempted from arrest shall happen to be taken by any writ of arrest that the court shall examine into his circumstances, "And if they find he is such as by this act is intended to be exempted, the court shall, of their own accord, abate the writ." We have examined into defendant's circumstances and have found that he is such as by the aforesaid act was intended to be exempted. The abatement of the writ must therefore follow unless by giving bail to the sheriff he has precluded himself from his right. The obtaining of the reduction of the amount of bail and discharge on common bail does not preclude a defendant from his right: Dobson v. Fitzpatrick, 2 W. N. C. 186. See also Becker v. Goldschild, 9 Pa. Sup. Ct. 50, where writ was quashed after bail entered.

He would be discharged on common bail even after giving bail to the sheriff, unless special damage be alleged: Morrison v. Gardiner, 39 L. J. 22.

In view of the positive provision that "No freeholder shall be arrested," etc., we are of the opinion that the arresting is in the nature of an unlawful act and is much more than a mere irregularity which can be waived by giving bail to the sheriff. Rule absolute.

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LEE VS. BALTIMORE & OHIO RAILROAD.

Negligence—Railroads—Crossing at station—Contributory negligence—Case for jury.

In an action to recover damages for the death of plaintiff's husband, it appeared that defendant railroad company maintained a station building upon one side of its double track road, and a platform without a shelter upon the opposite side, connected by plank walk for the use of passengers; that passengers were accustomed to remain in the station in cold weather until notified that the train was approaching; that it was the custom for passengers to remain in the station house until the train on the opposite track was in sight and then to walk over the crossing to the platform where passengers were received and discharged from such trains; that deceased, on a cold and dark night, purchased a ticket at the station, waited there until some one announced that the train, which was reported ten minutes late, was coming, and then with a number of other passengers, proceeded in the usual way over the crossing to reach the platform and that as he was stepping upon the platform, he was struck by a loose engine, which was running ahead of the passenger train at the rate of thirty miles an hour. Held, the contributory negligence of the plaintiff was for the jury.

Where a passenger is killed in crossing tracks at a station between the station and the train, the question of ordinary care is for the jury, unless the passenger stepped immediately in front of a moving train or did not take the way which had been provided.

In the Court of Common Pleas of Westmoreland County. No. 177 May Term, 1913. Motion for judgment n. o. v.

John E. Kunkle and C. C. Walthour, for plaintiff.

Robbins & Wyant, for defendant.

Doty, P. J.: It is evident that defendant is satisfied with the general course of the trial and with the amount of the verdict because no new trial is asked. The motion is for judgment non obstante verdicto. The contention is that there is no evidence which entitled the plaintiff to recover and, therefore, that judgment should be now entered for defendant notwithstanding the verdict.

There was gross negligence on part of defendant. The passenger train, which was behind time, was expected every minute; passengers going East were required to go from the station to a platform on the South side of the tracks; it was the custom for passengers to remain in the station until the approach of the train was announced and then to cross over to the platform. But notwithstanding such custom and the fact that a passenger rain was due, the engine which killed the deceased was run ahead of the passenger train, and past the station at such high speed that it could not be stopped until it had run several hundred feet beyond the point of accident. It is no answer to say that it is more difficult to stop a loose engine than a heavy train. If this be so, it was necessary to exercise greater caution in the approach of the station. In any aspect of the case, the question of defendant's negligence is for the jury. It was fairly submitted and, as we have seen, there is no complaint about the manner of submission. In no event would the court have been justified in deciding that question as a matter of law.

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But does the testimony show a clear case of contributory negligence on the part of the deceased? This question will not be hard to answer if we get a clear understanding of the facts and of the circumstances which brought about the accident.

Alexander Lee, the plaintiff's deceased husband, was killed on the Baltimore & Ohio Railroad on the evening of 24th November, 1912; it was cold and after dark; at Smithton Station, where the accident happened, there are two tracks lying South of the station, the Western track being nearer and the Eastern track further from the station, it is necessary for passengers going East to cross both tracks before they can get aboard the trains; a board walk has been provided leading across the tracks from the station to a platform on the South side; the Eastern trains discharge and receive all passengers from this platform and passengers cannot otherwise get on the cars as there is evidence to show that the doors on the North side of the Eastern trains are closed a this station; there is evidence to show that the doors closed at this station; there is no shelter provided on the platform and it is customary for passengers going East to wait in the station until the train is in sight. Thus John Keim, the ticket agent at Smithton, a witness for the defendant testifies that "it is the usual practice to leave the station after the rain is in sigh."

The deceased was a passenger; he bought a ticket for Jacobs Creek intending to take the 5:35 train; it was reported ten minutes late, which would bring it to Smithton about 5:45 at or about this time it was announced by some one that "she's coming," or "the train is coming;" all the passengers in the station started for the platform; twenty-five or thirty reached the platform in safety; one barely escaped by running; the deceased had cross the tracks and was within one step of the platform when he was struck by the engine which was running in advance of the passenger train and went past the station at the time the passenger train was due to arrive; the loose engine was running at a speed which took it several hundred feet beyond where the man was struck before it was brought to a stop; and that the deceased must have known of the approach of a train, as the view was unobstructed for some distance and he left

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the station with all the other passengers when it was announced that the train was coming.

The above statement shows how the accident happened. There is really no dispute about the facts relating to contributory negligence. The only question is whether the deceased exercised ordinary care under the circumstances. It does not appear that he violated any rule of law. As a passenger he was not bound to stop, look and listen; he did not step immediately in front of a moving train, as he was within one step of the platform when struck by the locomotive; he did what he was expected to do; he used the means provided for a passenger to reach the train; he followed the usual custom as evidence on both sides shows, and he did what all the passengers did that evening. It is true that he was the only one hurt; twenty-five or thirty reached the platform in safety; one of the passengers saw the danger and remained on the station side, and another barely escaped by running. The evidence does not show that all the passengers, or that any of them, ran from the station. In the emergency the witness Ross realizing the situation, ran to the platform. All the others, so far as the testimony shows, proceeded in the usual way, believing that the passenger train was approaching and would stop at the platform. Whether the deceased should have discovered that the train was running unusually fast and would not stop, and whether confronted by a sudden peril he should have run forward or jumped back, were questions for the jury. In other words, did the deceased act as a man of ordinary prudence under the circumstances? If this were a matter for the Court to decide, we should feel inclined to agree with the finding of the jury. It is hard to see what other course a passenger would pursue. All the other passengers started to cross to the platform after the train was in sight and in this they followed the usual practice.

In reaching this conclusion we have been guided by numerous decisions of the appellate courts. The facts here are very similar to the case of Keifner vs. Pittsburgh, etc., Ry. Co., 223 Pa. 50. The authority settles that the deceased was entitled to the protection of a passenger; that the company was bound to provide a safe passage from the station to the platform; that the crossing and platform were in effect a part of the station; that the deceased had a right to

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rely that the defendant would do its duty and provide a safe passage and that the question of contributory negligence was for the jury. There the announcement of the arrival of the train was made by the ticket agent; while here all the passengers left the station after the train was in sight. This distinction, however, is not vital as we find in Harper vs. Pittsburgh, etc., R. R. Co., 219 Pa. 368, the passengers on their own motion left the station when they heard "the train whistle for the station." Here, too, the deceased, as we have seen, must have known of the approach of the train, but with the other passengers he followed the usual custom and it was for the jury to say whether he should have been more observant and thus discovered that the engine was going at a high rate of speed. The deceased took the right way and left the station at the customary time. And such custom being acquiesced in and generally observed, must have been known to the servants of defendant and passengers would have the right to assume that the trains would be run accordingly. Such principle seems to have been controlling in Roberts vs. Penn. R. R. Co., 238 Pa. 404.

The cases seem to hold uniformly that where a passenger is killed in crossing tracks between the station and train, the question of ordinary care is for the jury, unless the passenger stepped immediately in front of a moving train or did not take the way which had been provided. An example illustrating the first exception is found in Goller vs. B. & O. R. R. Co., 229 Pa. 412, where the matter is summed up as follows: "The danger was manifest and the rule that one who is struck by a moving train, which was plainly visible from the place where it was his duty to stop, look and listen, will be conclusively presumed to have gone into an obvious danger." This case applies the rule declared in Carrol vs. R. R. Co., 12 W. N. C. 348, to wit: "That a person who steps in front ofa moving train that he saw or would have seen, if he had taken the care which the law and common prudence require, will be conclusively presumed to have been negligent." At least such interpretation is given in Weisenberg vs. R. R. Co., 237 Pa. 36. Both cases, however, differ from the one in hand in that it was not shown that the persons injured crossed the tracks in the customary way and as they were expected to do.

And as illustrating the second exception Yeosack vs. Rail-

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road Co., 221 Pa., 493, and Weisenberg vs. Railroad Co., are in point.

In Besecker vs. Railroad Company, 220 Pa. 507, it is held that a passenger crossing the tracks at a station is held to the duty of ordinary care and whether he performed that duty is for the jury. And to the same effect are Keefner vs. Pittsburgh Ry. Co., 223 Pa., 50, and Struble vs. Pennsylvania Co., 226 Pa. 118. In West Chester etc. Railroad vs. McElwee, 67 Pa., 311, the rule is laid down which has been followed since: "The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed but variable. Under some circumstances a higher degree of care is demanded than under others."

The rule is readily understood. The only trouble is to apply it to the circumstances of each case. And it is rare that two cases are found exactly alike in every detail. It is for this reason that authorities are apparently conflicting and sometimes confusing. There has been no case cited precisely like the one under consideration, but applying the general principle and following analogous cases, it seems reasonably clear that there was no error in submitting to the jury the question of negligence.

If the deceased made any mistake it was at the time he reached the eastern track. He, perhaps should have discovered at that point that the train was running at unusual speed and that it would not stop. Without fault of his own up till that time he was suddenly placed in a position of great danger. Whether he did the wrong thing then or failed to do the right thing the jury must determine. He left the station, as defendant's testimony shows, according to the usual practice; he followed the path provided for him; he did what was done by all the other passengers, and he had a right to assume that the train would be run in the customary way which had theretofore been recognized and permitted by the defendant company. The motion for judgment n. o. v. is therefore denied.

And now, January 17th, 1914, after due consideration, the motion for judgment non obstante veredicto is denied, and upon payment of the jury fee judgment on the verdict.

NOTE—The judgment in this case was affirmed in 246 Pa. 566.

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McCLUNE'S ELECTION CASE.

Election Law. — Allegations in a petition to contest an election.

The end to be kept in view in an election contest, is, not, that there may have been irregularities in the conduct of some of the members of the Election Board which may be censureable by the terms of the election law, but whether the contesting candidate has been injured, by having, by the Election board's mistake or misconduct, legal votes cast for him, not counted, or by having votes that were illegal counted for his competitor, and tha, when these injuries are redressed in a contest, the change wrought by their correction, would be su cient to show, that the contestant, and not the contestee had been legally elected.

If taking the allegations of a petition of the contestant to be true, in which it is sought through that instrumentality to initiate a proceeding in Court to contest an election, they would be insufficient if sustained by evidence to show that the election had resulted in his favor rather than in favor of his competitor, such contest ought not to be entertained nor should a practice be encouraged of, for trivial reasons, appealing from results, in good faith, ascertained at the polls, to proceedings in the courts especially, on grounds not shown or averred to have transgressed the legal rights of the contestant.

If there have been forbidden acts committed by some members of the election board, acts which may or may not be penalized by the terms of the statute, when, in a proper case, the law is sought to be enforced, they are not for consideration in a proceeding of this kind, unless those acts are averred or shown to have been destructive of the individual rights of the contestant with respect to the results of the election.

In the Court of Quarter Sessions of Westmoreland County, No. 10, Nov. Term, 1919. Petition to contest an election of a Justice of the Peace in the Borough of Ligonier,

Lewis C. Walkinshaw, for contestant.

BY THE COURT:

McConnell, P. J.: On the 15th of November, 1919, a petition, purporting to have been signed by forty-five qualified electors of the Borough of Ligonier, was presented to the Court of Quarter Sessions, through the instrumentality of which it is sought to initiate a proceeding in court to contest the election of one, Franklin T. Cook, who has been returned, by the proper election board, as having been elected to the office of Justice of the Peace in said borough, at the State and municipal election held on the fourth day of November, 1919. His competitor at that election was one, C. M. McClune, in whose behalf this proposed contest is now sought to be instituted.

According to the returns, as certified, C. M. McClune, at that election, received 189 votes, and Franklin T. Cook received 193 votes. Two of the petitioners, to wit: A. B. Myers and C. W. Crawford, were election officers who served at that election, and have joined with the other election officers, in certifying the correctness of the computation of the result, as it was returned by them. A. B. Myers was the Judge, and C. W. Crawford was the Majority Inspector at that election, and they, with others, are petitioners in this proceeding.

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We do not understand it to be alleged in the petition, that the return that was made is not truly representative of the facts as they appeared at the time of examining the ballots and computing the result. We do not understand that this petition, in which the two election officers aforesaid have joined, is designed to assert, or does assert,—that they, with the other election officers, joined in making any confessedly false, or fabricated return, with respect to the number of ballots in the box, nor with respect to the respective candidates for whom those ballots had been cast. No fraud is now asserted in that respect. We must consider, therefore, that this petition is predicated solely on the ground that all the ballots found in the ballot-box, and entering into the returned computation of votes, were not representative of the votes of legally qualified electors of the borough. And, looking at that as being the intended purport of this petition, we are also required to consider that all the ballots actually cast, were either cast by registered voters of the district, or, if not registered, that the ballot of the voter could not legally have gotten into the box, without the requisite legal proof of the voter's right to vote having been first made to the board —to the sufficiency of which proof—the Majority Inspector, or the Judge—must have, at the time, assented. If a registered voter's right had been then challenged, the same would have been true. There is no complaint of irregularity in these respects. We must, therefore, take it, that, under this petition, its intended scope is, that we should confine ourselves to the question of what is therein asserted to make some of the votes in the ballot-box illegal, and which, therefore, should not have been allowed, as they have done,—to figure in the computed and certified result, and that the allowance of them by the board so to do, has been to the detriment of the contesting candidates in the correct result as to the person elected.

The end to be kept in view in an election contest, is, not, that there may have been irregularities in the conduct of some of the members of the election board which may be censurable by the terms of the election law, but whether the contesting candidate has been injured, by having, by the board's mistake or misconduct, legal votes cast for him, not counted, or by having votes that were illegal counted for his competitor, and that, when these injuries are redressed in

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a contest, the change wrought by their correction, would be sufficient to show, that the contestant, and not the contestee, had been legally elected. If, taking the allegations of the petition of the contestant to be true, they would be insufficient, if sustained by evidence, to show that the election had resulted in his favor,—rather than in favor of his competitor, a contest ought not to be entertained, nor should a practice be encouraged of, for trivial reasons, appealing from results, in good faith, ascertained at the polls, to proceedings in the courts, especially, on grounds not shown or averred to have transgressed the legal rights of the contestant. If there have been forbidden acts committed by some members of the board,—acts which may, or may not, be penalized by the terms of the statute, when, in a proper case, the law is sought to be enforced—they are not for consideration in a proceeding of this kind, unless those acts are averred or shown to have been destructive of the individual rights of the contestant, with respect to the results of the election. Violations, even of the criminal law, not shown to have been productive of prejudice to the rights of the complainant, by giving an undue result in favor of his competitor, are necessarily, aside from the end to be legitimately aimed at in a contested election case. The 18th section of the Act of 19 May, 1874, P. L. 213, (2 Purd. Dig. 1393,) provides, inter alia, as follows:

> "The petition shall be presented to the court, or law judge having jurisdiction, except where otherwise provided in this act; and if it shall be adjudged sufficient, it shall be filed of record in the proper court, and, thereupon, a time shall be fixed for hearing," &c.
>
> "When a complaint in a contested election proceeding is in due form upon its face, it is the duty of the court to take jurisdiction, and to make such orders and decrees, as will speed the investigation. When, however, the prerequisites necessary to confer jurisdiction have not been complied with, as shown by the face of the complaint itself, the proceeding will not be entertained, but, on the contrary, will be dismissed, at once." In Re-Barber's Contested Election, 10 Phila., 579.

We are, at present, to pass on the question of the sufficiency of this petition on its face, to require the Court to de-

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clare its legal sufficiency, in order to its being entitled to be filed in the proper court.

The same section of the Act of 1874 from which quotation has just been made, also provides: "The petition shall concisely set forth the cause of complaint, showing wherein it is claimed the election is undue or illegal."

Therefore, what is not set forth in the petition is to be treated as not having been made relevant to the proposed proceeding in the case.

In the contested election of Jenkinson, 7 Dist. Reports, 598, Judge White of Allegheny County, said this, of that contested election: "The Act of Assembly requires that the petition for a contest of this kind, 'shall concisely set forth the cause of complaint, showing wherein it is complained the election is undue and illegal.' It is not sufficient to set forth in general terms, however positive, numerous frauds and illegal voting. It must set forth specially the frauds and illegal votes, and show that these frauds and illegal votes elected the party returned, and defeated the contestant. For that purpose, it is necessary to state for whom these voters voted. The petition of complaint, or the papers connected with it, must give the names of the alleged illegal voters, and the grounds of illegality, so that the respondent may know what he is called to meet."

> "In cases of contested elections, the courts are not like a board of canvassers, but their duties are to examine into the existence of such specified frauds and irregularities as would nullify the result made by the return judges. The powers of the court are but judicial. Precision and accuracy are the vital elements of all judicial forms. Every fair presumption is to be made in favor of the officers conducting the election."

With reference to a proposed amendment to the original complaint, involving a proposed addition of forty-nine names of alleged illegal voters at the same election, Judge White also said, in the case first mentioned, this: "It is nowhere stated for whom the 49 voted. Unless they voted for Jenkinson, it is no ground of contest. In the original petition, it is substantially averred that the 91 voted for him. The amendment asked for is to add the 49 to the original list; but it should have been stated that they also, voted for Jenkinson." The amendment was, therefore, refused.

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In the case of the contested election of John T. Griffiths, 1 Kulp, 157, Judge Rice said. "The Court, in trying an election contest, acts, not as a canvassing board, but judicially, and cannot throw out, or inquire into, the legality of a vote, unless that vote is attacked by the pleadings."

In the case of the contested election of Edwin R. Wheelock 82 Pa., 297, the election was not held at the place designated in the sheriff's proclamation, but at a place forty rods distant therefrom: "Held, that the irregularity was immaterial, under the circumstances, as its correction would not change the result of the election."

In the case of Zerly v. Snare, 107 Pa., 183, the following was said: "A petition was filed to contest the election of a borough officer, which averred that many illegal ballots were cast and counted against the contesting candidate, and if they had not been counted, the contestant would have been elected; the petitioner, however, failed to aver expressly, that said illegal votes were cast for the candidate who was declared elected, and also omitted to state the number of such illegal votes, or the whole number of votes cast; Held, that the petition was defective and insufficient, and was properly quashed."

Skerrett's case, 2 Pars., 514, although not decided under the present election law, nevertheless, contains many points that always have been of value in contested elections, and may be of value in this case. It was held in that case,—under the legislation then existing,—as follows: "A petition which merely contains a complaint, of 'undue election,' is not sufficient. The terms 'undue election or return,' are the expressions of facts which constitute such an election or return undue. And these facts must be a sufficient ground for setting the elections aside. The complaint must plainly and succinctly state such facts, which, if sustained by proof, would render it the duty of the court, either to vacate the election entirely, or to declare that another party, and not the person returned, was duly elected to the office in question. Unless the petition is thus perfect, the court will quash it on motion.

Where the petition states mere irregularities, and want of conformity to the provisions of the election law, that are merely directory, the Court, for that reason, will not set

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aside an election, when there is no allegation of fraud or mistake thereby.

Where a petition merely states that D. C. S. was returned elected, it is too vague and general. It is a statement of conclusions, not of the facts from which they are drawn. It is stated in the petition that many illegal votes were received and counted for D. C. S., and fraudulent votes were received and that, by the illegal mode of counting the tickets, a majority had been made to appear in his favor; such an averment is not sufficient. It must be stated in the petition what would have changed the result, and the manner in which it would have been changed."

Applying the principles exemplified in the foregoing cases to the petition submitted in this case, should the Court adjudge it to be sufficient, or insufficient? That is the now-pertinent question.

The charging part of the petitior begins at the 8th paragraph. In brief, it is therein alleged, that, while Frank Houpt, Minority Inspector, and N. M. Weller, Jr., one of the Clerks, were engaged in entering each vote on one tally paper, Houpt had a pencil in his hand. This is forbidden by the Act of Assembly, but it is not alleged that any fraudulent use of it was made, or that the number of votes cast for the respective candidates for the office of Justice was, in anywise, affected thereby. It is also alleged therein, that, during the reading of the votes by the Judge, the same Minority Inspector had, for a considerable time, left the election room, and the same Clerk had, during his absence, entered the record thereof, on both tally sheets; but it is not therein alleged that the record so kept was made to be, by reason of his absence, variant from what was indicated by the Judge's reading of the ballots, or that the record so made is false, or a willfully fabricated one. Certainly this temporary absence of the Inspector was an unauthorized mode of proceeding, but our question now is, as to whether it affected the contestant's rights, with respect to the certified result. It is not specifically averred that it did have such an effect.

"In cases of contested elections, where there are irregularities complained of in conducting the election, when not of a flagrant kind, the court will look to its good faith and integrity. The courts are not to defeat the expression of the popular will because of some slip in the minor details

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of an election. Hence, where one of the clerks, by intoxication, was unable to continue his labors, and another person was called to act in his place, but was not sworn, and continued to officiate until the regular clerk was able to resume his duties, the court refused to set an election aside on this ground,—there being no allegation of fraud or mistake in conducting the election." Boilean's Case, 2 Pars. 507.

It is alleged in the petition that these acts complained of, in this paragraph, with respect to the Inspector and Clerk, were contrary to the provisions of the Act of Assembly governing elections. Conceding that to be true as to the mode of their procedure, but, if the procedure followed, though irregular, nevertheless eventuated in giving in the certified return, to each candidate all that he was entitled to, according to the ballots—and no more—the special thing we are inquiring about has not been affected thereby. It is not averred that that special wrong has been thereby affected, and, without averment, we are not to assume that it was. It is only claimed in the position, that the recited mode of procedure was "fraudulent, illegal and void," and that, "for these reasons, the said certification of said election officers, showing that the said Franklin T. Cook received a majority of votes cast for the office of the Justice of the Peace in the Borough of Ligonier, is illegal and void." That deduction is a non-sequitur.

Whether the irregularity recited is properly characterized, as the petition characterizes it, is not for us in this case, the material point; whether such procedure helped or hurt C. M. McClune, in the matter of recorded or certified votes, or whether he and his opponent thereby received precisely what they were entitled to, according to the ballots, is, in so far as the petition's averments are concerned, left open for mere surmise. The law would surmise, in the absence of a specific averment to the contrary,—that each candidate was certified to have received precisely what he was entitled to, according to the ballots. If all that is averred in this paragraph were established by proof, and no more, it would still not show that either of the candidates would be entitled to have, in the contest, more or fewer, votes counted for him, that has been actually certified by the election board to have been given to each of them.

The ninth paragraph alleges that four UNNAMED and

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otherwise unidentified non-residents of the district had been permitted to vote, and that they had voted for Cook. Who were they? Were their names on the registry list? Was their right challenged? Do the two election officers, whose names are at the head of this petition, mean to say they or or either of them, consented, without proof, to the receipt of these four alleged illegal votes? With respect to what specific voter's rights could an issue be made an answer of the respondent? They should be named, to the end that respondent's answer might take issue with respect to their rights as qualified electors of the district, if he desired to do so.

The tenth paragraph alleges that eight persons had been allowed to vote, "Who were presumably above the age of 22 years, who had not paid taxes or produced tax receipts,—or been required by the board to do so.

Why "presumably?" By whose presumption? What was the actual fact? Who were they? Above all, for whom did they vote. In so far as averment is concerned, we have as much right to assume that they voted for McClune, as to assume they voted for Cook. If they were actually and not simply "presumably," above the age of twenty-two—and that were proven—and no more than what is averred—could the Court, in a contest, count any more votes for McClune, or any fewer for Cook? If so, how many.

The 11th, 12th and 13th paragraphs disclose no new facts, but are expressive of legal conclusions and reasoning deducible from the supported sufficiency of averment in the paragraphs already considered. They need not be now specially discussed, for they bring into the case only differing aspects of facts already considered, or conclusions therefrom, and what petitioners say they believe about them.

The 14th paragraph embodies the prayer of the petition. Among other things, it is therein asked that the ballot-box be impounded, and opened. It must be remembered that now—without numbering—all ballots "look alike" in the ballot-box, and an inspection thereof would not afford evidentiary identification of only illegal ballots, so that they alone might be eliminated from the count. If 400 voters were to be called to tell how they respectively voted—it is a course of procedure that would be an unsatisfactory substitute for a procedure formerly available and existing, when ballots were required by law to be numbered.

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"Ballot-boxes cannot be opened until it is proved that they contain illegal votes, or evidence of miscounted results, and then only when corruption would reverse the return, unless it be apparent that there was a general course of misconduct in the election board, the particulars of which, as affect the election, could not otherwise be known." Northampton County Contested Elections, No. 2, 6th District Reports 150.

The circumstances as recited in this petition are not such as would make an opening of the ballot-box as a mode of discovery, of practical value—unless it might be ordered, for the purpose of patronizing a fishing expedition out of season. It is not rarely that we hear the words "fraud," "illegality," &c &c. made use of after an election by those dissatisfied with the announced result—and, while taking counsel of their ten-feelings, they may, in all sincerity, use such terms, but the standard of the law, unaffected by feelings of acute disappointment, has a different guide for determining what is legally appropriate for a given situation.

"In the absence of fraud in an election, a contest is not to be encouraged, and, if there appears to have been an honest expression of the popular choice, and a fair count of the votes, the election ought to stand. Mere irregularities will not avail to set aside, nor where nothing else appears, will these furnish probable cause for a contest." Per Rice, P. J., in Contest of Election of Jno. T. Griffiths, 1 Kulp, 157.

We adjudge this petition to be insufficient, and it is accordingly dismissed.

COMMONWEALTH Vs. GATTI. (1.)

Dog Law.—Possession of dogs by unnaturalized foreign born residents. Act of June 1, 1915, P. L. 644.

Where upon an appeal from a summary conviction under the Act of June 5, 1915, P. L. 644, prohibiting foreign born residents having dogs in their possession, such conviction cannot be sustained against a defendant who is an unnaturalized foreign born resident, where it appears that the dog was owned by the defendant's minor son, who was a native born citizen and who had paid taxes on the dog and had also taken out a license to hunt game, even though the son's residence and place of actual abode was in the premises and in the house occupied and controlled by his father, the defendant.

In the Court of Quarter Sessions of Westmoreland County, No. 96, February Sessions, 1919. Appeal from summary conviction.

Thomas G. Taylor, Ass't. District Attorney, for Commonwealth.

Williams, Wegley & Doran, for defendant.

Copeland, J.: This is an appeal specially allowed the 21st day of January, 1919, and filed by leave of Court nunc pro

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tunc as of the 10th day of January, 1919, by the defendant, who was, on the last mentioned date, convicted before a Justice of the Peace of violation of the Act of June 1, 1915, P. L. 644.

The first Section of this Act provides: "That it shall be unlawful for any unnaturalized foreign-born resident to hunt for, capture or kill in this Commonwealth any wild bird or animal, either game or otherwise, of any description, excepting in defense of person or property; and, to that end, it shall be unlawful for an unnaturalized foreign born resident within this Commonwealth to either own or be possessed of a dog of any kind."

This Act also provides a penalty of fine or imprisonment and the forfeiture of such dog upon conviction of a person violating the Act. It is further provided in the third section of this Act: "The possession of a dog at any place outside of buildings, within this Commonwealth, by an unnaturalized foreign born resident, shall be conclusive proof of violation of the provisions of Section 1 of this Act, and shall render any person convicted thereof liable to the fine as fixed by said Section."

It is further provided in the fourth section of this Act: "The presence of a dog in a room or house or building, or tent or camp of any description within this Commonwealth, occupied or controlled by an unnaturalized, foreign born resident shall be prima facia evidence that such dog is owned or controlled by the person occupying or controlling the property in which said dog is found and shall render such person liable to the fine imposed by Section 1 of this Act."

The petition for allowance of appeal admits that the defendant is an unnaturalized, foreign-born resident of the Commonwealth and of Westmoreland County, and does not deny that two dogs were kept on and about the premises occupied and controlled by the defendant at the time mentioned. On the hearing of the appeal, the testimony of the Commonwealth's witnesses did not go further than to show the presence of two dogs on the premises and in the house occupied and controlled by the defendant. There was no testimony introduced on the part of the Commonwealth to show possession of a dog by the defendant at any place outside of buildings, or that the defendant used a dog or dogs in hunting, contrary to the Act.

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The petition for allowance of appeal also avers, and the proofs offered by the defendant and a number of witnesses called in his behalf fully sustains the averments, that the two dogs in question were owned by Raymond Gatti, a minor son of the defendant, who was a native born citizen of the United States and of the State of Pennsylvania; that the tax imposed by law on said dogs had been paid by said Raymond Gatti for the year 1918; and further shows that Raymond Gatti was a person duly licensed to hunt game in Pennsylvania for the year 1918; and also that he had his residence and place of actual abode on the premises and in the house occupied and controlled by his father, the defendant.

The Commonwealth, nevertheless, contends that the presence of the two dogs in such house or home, rendered the defendant liable to conviction and fine. To sustain this contention would involve a disregard of the evidence and the clear intendment of the fourth section of the Act, which provides that the presence of a dog in such house shall be only prima facia evidence that such dog is owned or controlled by the person occupying or controlling the property in which it is found.

There is nothing in the law which forbids a citizen of the United States of any age to own a dog or dogs. That the dogs in question were owned by Raymond Gatti, as stated before, was conclusively proven. Nor is there any law prohibiting such owner from keeping such dogs in the house in which he resides. Accordingly, the said Raymond Gatti had the right to keep his dogs in the house which is the common home of himself and his father.

At the trial it was also contended, without any citation of authority for the contention, that a fact admitted, viz: that Raymond Gatti was not yet twenty-one years of age, in some manner or to some extent limited his right to own and keep dogs in the common residence of himself and his unnaturalized foreign born father. We have been unable to find authority to support this contention.

It is clear, therefore, under the evidence, that the defendant is not guilty of a violation of the Act of Assembly under which the charge against him was preferred. The conviction is, therefore, illegal and void and the judgment of the Justice of the Peace is set aside and the defendant discharged.

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AND NOW, to wit: the 19th day of July, 1919, after argument and after due and careful consideration, it is ordered and decreed that the judgment of the Justice of the Peace be and, hereby is, set aside and the defendant discharged.

COMMONWEALTH Vs. GATTI (2)

Possession of guns by unnaturalized foreign born residents.—Acts of May 8, ...1909, P. L. 799, and July 11, 1917, P. L. 799.

Where in an appeal from a summary conviction under the Act of May 8, 1909, P. L. 486, as amended by the Act of July 11, 1917, P. L. 799, of a defendant, an unnaturalized foreign born resident, for having in his possession two shot guns found in his dwelling house, it appeared that one of the guns belonged to defendant's minor son and the other to an unnaturalized citizen, both of whom lived with the defendant and had hunter's licenses, it was held that the mere fact that these guns were found in a house or dwelling occupied or controlled by the defendant did not render him amenable to these Acts of Assembly in view of the undisputed evidence that the fire-arms were owned and kept in the place of residence of persons having a legal right to own and keep them.

In the Court of Quarter Sessions of Westmoreland County. No. 97 February Sessions, 1919. Appeal from summary conviction.

Thomas G. Taylor, Ass't. District Attorney, for Commonwealth.

Williams, Wegley & Doran, for defendant.

Copeland, J: This case was heard on appeal by defendant from a conviction before a Justice of the Peace, which appeal was allowed and filed at the same time as the appeal taken by the same defendant at No. 96 February Sessions, 1919, in which the judgment of the Justice of the Peace was set aside and the defendant discharged in opinion this day handed down.

The defendant in this case was convicted for violation of the provisions of the Act of 8th May, 1909, P. L. 466, as amended by the Act of 11th July, 1917, P. L. 799, which makes it unlawful for an unnaturalized, foreign-born resident to hunt for, capture or kill wild birds or animals, and, to that end, makes it unlawful for such person, within the Commonwealth, to either own or be possessed of a shotgun or rifle of any make, or a pistol, or a firearm of any kind. The provisions of the Act with respect to the possession of firearms are in almost precisely the same terms as the provisions of the Act of the 1st of June, 1915, P. L. 644, forbidding such unnaturalized foreign born resident to own or be possessed of a dog.

On the hearing of this appeal, it appeared, by the admission of the defendant as well as by the testimony of the

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witnesses for the Commonwealth, that two shotguns were kept and found in the house or dwelling of the defendant in Burrell Township, this county, on the 31st day of December, 1918. There was no evidence that the defendant was in possession of these firearms outside of any building, or that he hunted or killed any wild bird or animal in violation of the terms of the Act of Assembly.

In this case, as in the case relative to the possession of two dogs, it was shown that the ownership of the guns was in others than the defendant. It was proven by competent testimony that was not contradicted that one gun was owned by Raymond Gatti, a minor son of the defendant, who had his residence in the house of his father, in which the guns were found, and that the other gun was owned by Frank Ferrari, an unnaturalized citizen of the United States, residing in this Commonwealth, and that the gun was kept in a room in the house of the defendant which was rented and occupied by Frank Ferrari. It was further shown that both Raymond Gatti and Frank Ferrari, owners of the guns in question, were, at the time the information was made against the defendant, licensed to hunt in the Commonwealth for the year 1918. It also appeared that Raymond Gatti was over the age of sixteen and that he had regularly obtained his Hunter's license.

The contention of the Commonwealth that, nothwithstanding these facts, the mere presence of the shotguns in the house or dwelling occupied and controlled by the defendant, rendered him liable to the penalty imposed by Section 1 of the Act, and for which judgment had been entered by the Justice of the Peace, if sustained would rob any significance the words of the fourth Section of the Act, which provide that "the presence of a shotgun or rifle or pistol or firearm of any kind in a room or house or building or tent or camp of any description within this Commonwealth, occupied or controlled by an unnaturalized foreign-born resident shall be prima facia evidence that such gun is owned or controlled by the person occupying or controlling the property in which the gun is found," etc.

The evidence is clear that these firearms were owned and were kept in the place of residence of persons having a legal right to own and keep them. The judgment of the Justice of the Peace is erroneous and it is, therefore, set aside and the defendant discharged.

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AND NOW, to wit: the 19th day of July, 1919, after argument and after due and careful consideration, it is ordered and decreed that the judgment of the Justice of the Peace be, and hereby is, set aside and the defendant discharged.

COMMONWEALTH VS. HAMILTON.

CRIMINAL LAW.—Quashing Bill of Indictment where information is required to be made by Bureau of Medical Education and Licensure.....Acts of 3 June, 1911, P. L. 639 and 25 July, 1913, P. L. 1220.

Where an information under the Acts of 3 June, 1911, P. L. 639 and 25 July, 1913, P. L. 1220 for practicing medicine without a license is made by a private citizen and not by the Bureau of Medical Education and Licensure, a bill of indictment founded thereon would be quashed.

Where under the above recited Acts of Assembly an indictment is not in accordance with the procedure prescribed by the statute because it has been prepared and signed by the District Attorney and not by the Attorney General or special attorney, or both, as prescribed by the statute, such bill of indictment, on motion, will be quashed.

In the Court of Quarter Sessions of Westmoreland County. No. 7, November Term, 1919.

Nevin A. Cort, District Attorney and Charles C. Crowell, for Commonwealth.

Moorhead and Smith and S. W. Bierer, for Defendant.

Motion to quash indictment. After an argument, the Court delivered the following oral opinion:

McConnell, P. J.: The defendant has been indicted for practicing medicine without a license in a bill of indictment found on the twelfth day of November, 1919. In this bill of indictment there are six counts founded upon provisions of existing Acts of Assembly with respect to which defendant is alleged to have committed a violation. They may be grouped under the general designation of practicing medicine without a license, for the purposes of the nation that we are now asked for to dispose of. The motion is made before the selection and swearing of the jury for the trial of the case. The grounds alleged in support of the motion are as follows:

1. The information or complain was not made as provided by the statute, to wit: By the Act of 12th of July, 1913, P. L. 1220, because it was not made by the Bureau of Medical Education and Licensure.

2. The indictment is not in accordance with the procedure prescribed by the same statute, because it has been prepared and signed by the District Attorney, and not by the Attorney General or special attorney or both.

3. The defendant is entitled to the benefit of the statute in every way, as well as subject to its penalties, and being a penal statute it must be strictly construed.

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Speaking generally of these reasons, we say that, in our opinion, they are adequate to support the motion now made. The bill of indictment is signed by the District Attorney, "Nevin A. Cort, District Attorney." It was that document that was presented to the Grand Jury, and on that the bill has been found. There is no indication of any authority other than the ordinary authority of a district attorney to prefer such a bill. The basis for the bill that appears in the information is signed by "C. E. Snyder, M. D., complainant." It is dated the 17th of July, 1919. It is therein charged that "the defendant did, on the above date, and at divers other times before and after said date, unlawfully engage in the practice of medicine and surgery, and did hold himself forth as a practitioner in medicine and surgery, did assume the title of doctor of medicine and surgery or doctor of specific diseases, and did represent himself as skilled in the healing art, and did invite the confidence and patronage of the sick and afflicted, and did diagnose diseases and treat diseases, and charge a fee for the same, all of which is contrary to the General Act approved the third day of June, 1911." And, added to this, we have the following: "This information made upon the instance and advice of John M. Baldy, M. D., President of the Bureau of Medical Education and Licensure, who believes the same to be true."

As far as the information is concerned, it only charges a violation of the Act of 1911. However, that is not the thing that is the proper basis for determining the question of the sufficiency of this bill of indictment. That Act of 1911 is a general Act, and its title sufficiently indicates the purpose of that Act. Further, it has been modified and amended by a later Act of the 25th of July, 1913, P. L. 1920, and such amendment is the basis of the allegation of the insufficiency of the present bill of indictment. In so far as the original Act of 1911 is concerned, the enforcement of it was left open to the ordinary modes of procedure for enforcement of penal statutes. Any one knowing of the violation of the statute could then, in the ordinary way, make an information and proceed in the way indicated in the statute for the enforcement of the law as against such violation.

But the Act of 1913 changed that. It committed the enforcement of the law as against its violations to a particular tribunal. Now there is likely a very good reason for the pro-

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visions that are contained in this Act of 1913. We must remember that legislation of this kind is designed to protect the public from impostors, to protect the public from those who pretend to a knowledge of a science that they do not have. It is for public protection, and not in the interest of licensed doctors, that the law is created. When the authority to enforce the law against violations of the statute was changed from any volunteer informant to a different tribunal, there were certain things provided by that amending statute that are of substantial importance. As we have said, this was not a change any more than the original Act had sought to accomplish; this change was not made to accomplish anything substantially different from what the original Act has been, the protection of the public. Cicero in one of his orations said that he would not deliver an accused person from the hand of a magistrate to the hand of a hostile mob. When the change came to be made here to put the power in the hands of some medical authority rather than in the hands of the public that was to be protected, there were certain safeguards that the law-making power saw fit to express, the proper means of protecting from abuse such informations as are authorized under these two statutes. It was not the Medical Society of Greensburg, in the county wherein the alleged violation of the statute was committed by the defendant; there might be hostility there of such a character as not to make it proper that the medical society should take the initiative and make information against alleged violations of this Act; it was not to such an authority that the question of determining when accusations of his kind should be made was committed, but it was to the Bureau of Medical Education and Licensure, to be attached to the Department of Public Instruction. That Bureau, as the Act provides, "shall consist of seven members, two of whom, the Superintendent of Public Instruction and the Commissioner of Health, shall be ex-officio members thereof; the remaining members shall be appointed by the Governor of the Commonwealth, who shall appoint the same on or before September first, 1911. The said five members shall be selected according to certain rules that are prescribed in the second section of this Act." And the make-up of that Board is, therefore, such as to sufficiently protect against informations being instituted as a provision for the protection of any medical society rather than for the protection of the public

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at large. The make-up of that bureau will approach such questions as may appear before it from different angles. They are not all to be of the same schools of medicine necessarily, but they are designated in the particular way set out in the second section. Then the next section of the Act says "That said Bureau shall be known by the name and title of the 'Bureau of Medical Education and Licensure of the Department of Public Instruction of the Commonwealth of Pennsylvania,' and shall effect its organization immediately after the appointment of its members by the Governor. At the first meeting held for the purpose of organization it shall elect from its membership a president and a secretary, who shall also be a treasurer, and it shall have authority to make rules and regulation for the transaction of its business, and for registration of all physicians of this commonwealth, and for the conduct of examinations of applicants" and so on.

So that, it is a board, it is a bureau, that the authority is reposed in it the first instance, rather than in volunteer informants from the general public. And it is a provision of the Act of Assembly that it shall be the duty of the bureau to enforce all the requirements of this act. "In the case of violation of the provisions of this Act, procedure shall be through either the office of the Attorney General of the State of Pennsylvania, or by special attorney, or both, at the discretion of the Bureau." It is the bureau that shall look to the enforcement of the provisions of this Act. Since this amendment has been made we must assume that it was made for a purpose. If the original act was left open so that any one could make the information, since this amendment was made we must interpret it to mean that that right was taken away, and was reposed in this bureau for a good reason. Whether the original act was not being enforced by volunteer informations, or what the reason was, is not material. It is sufficient that this original act was amended in respect to the procedure, and that amendment, in so far as important in this connection, is in the words which I have already quoted.

Now, it is a penal statute. The violation of the provisions of this statute are punished in the manner designated therein. And after this amendment has been made, then the action of the bureau is the place where the prosecution is to start from. That bureau is authorized to adopt rules and

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regulations for the conduct of its business, and this is a part of its business. It is made the special duty of that bureau, and it should act as a bureau, either by special consideration of the facts in a particular case, or by general rules authorizing some designated member of it to express its conclusions with respect to that particular case. Into this particular case as it comes before us now there runs no indication of compliance with that provision. We have not any indication here in the terms of the indictment that the bureau is seeking to enforce the provisions of this statute. We have not any indication in the manner in which the bill is signed showing that the Attorney General of the State of Pennsylvania is conducting this proceeding, or that it is being conducted by a special attorney, or both, at the discretion of the bureau. Now what do these words mean? They are not meaningless; we cannot understand that they are destitute of meaning. They express a procedure that we think is material. This was not left at haphazard.—I mean the enforcement of this statute. It was put in the hands of a bureau that could, in some general mode of procedure, enforce the law against violations of this statute. There would be uniformity of procedure through the Commonwealth's placing the enforcement of this law in the hands of a designated bureau made up in such a way that the Act would not be prostituted to serve the purpose of enforcing some economic scheme of practicing physicians whose business might have been interfered with in a particular case. The object was to remove it as far as possible from local jealousies, and to remove it as far as possible from being made to subserve a purpose other than the protection of the public against impostors who undertake to deceive the public.

Now that being the significance of the original statute, when taken in conjunction with the amendment, we ought to be able to see that a particular case as it comes into court, comes into court on the authority of that bureau and through the officials designated in the terms of that amendment. This is not signed by the Attorney General. The District Attorney is not a deputy of the Attorney General. There is nothing along the pathway of this case in any papers that we now have before us that indicates that we have a case that it being presented to court in such a way that the court ought to take jurisdiction of.

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In a case that has been quoted in the argument, there is quoted from a text book which is generally recognized, a provision of this kind: "No person is to be made subject to a penal statute by implication. All doubts concerning their interpretations are to preponderate in favor of the accused." And again: "The doctrine is that when an offense is created by statute, and the same statute prescribed a penalty, or the mode of procedure, or anything else of the sort, only that which the statute provides can be followed."

Now, allowing that to have operation in this case, the case now in court falls under the censure of those provisions as being a case conducted by a procedure that the Court, on a motion of this kind, should not recognize. It does not matter about the correspondence that there may have been between the prosecutor and one Dr. Baldy, who is said to be president of that board. It does not matter about any letter since the making of this information and the originating of these proceedings; it does not matter about any letters that Dr. Baldy may have sent to the District Attorney relating to what he says has been authorized as the action of the Medical Society of Westmoreland County. The Medical Society of Westmoreland County has no place in the legitimate procedure of a case of this kind. And Dr. Baldy, simply as Dr. Baldy, has no place. In a proceeding, when it has been examined by the proper bureau, either specially, or under its general rules, when the bureau has determined that there is a proper case for prosecution, and the Attorney General authorizes by his consent, and advice the introduction of such a proceeding, and that is followed up here, and the case comes before the Grand Jury in that shape, then we have a case that comes into court by the authorized procedure. There is a provision in this Act that leaves some discretion to the bureau as to whether it is the Attorney General that shall proceed for the enforcement of the law, or whether it is by special attorney. And we understand that "special attorney" to be the attorney specially representative of the Attorney General's office. When we have a case thus originating and thus coming into court, we then have a case that it is proper for us to require the defendant to plead to the indictment.

Cases have been referred to in the argument,—one case disposed of by Judge Rupel, in which there was a motion in arrest of judgment after the merits of the case had been

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passed on by a jury and after the accused person had seen fit to pass his opportunity and take his chance of acquittal before a jury, and when the merits of the case had been heard and he was convicted, then it would be too late for him to betake himself to a question of procedure that he had voluntarily seen fit to pass by. We do not regard that as being any measure of the case as we have its status at present. Here is a motion made in liminie before a jury is sworn and before the defendant has been required to plead. And the proper place for a motion is not in arrest of judgment, but in arrest of the procedure for requiring him to plead. The other points that have been referred to in the argument shed no light on the particular case that we have under consideration. The particular question that we have under consideration is the authority to demand that the accused plead to this bill of indictment, having the history that it has, and lacking the authority which it lacks. This is a penal statute, and when the Commonwealth through its statute has spoken as to the mode of procedure, there is an end of considering what the proper procedure is. It is penal, and it is just as important that the procedure should be followed in a penal statute with accuracy. So that, we have no doubt but that this motion should be sustained, although without any opportunity for making research beyond what has been disclosed on the oral argument in support of this motion. We think that all three of the reasons assigned here should be sustained. The bill of indictment is accordingly quashed for these reasons.

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WHITEHEAD vs. ORMESHER AUTO CO.

Striking off judgments improperly entered—
Change of names.

Where a suit is brought before a Justice of the Peace and judgment rendered in favor of the defendant in an action in which the defendant is named as "Ormesher Auto Company;" the plaintiff takes an appeal and thereafter files a statement in the Court of Common Pleas reciting the name of the defendant as "Ormesher Auto Company, Incorporated" and took judgment for failure of the defendant to file an affidavit of defense, the court, on motion, will strike off the judgment where it appears that the defendant had no notice of the filing of the statement, it appearing that the defendant in the original proceeding was an individual trading under the firm name and not a corporation.

Where a suit is brought against a corporation which does not exist, a partnership of the same name cannot be brought on the records by rule to amend the statement.

In the Court of Common Pleas of Westmoreland County. No. 47 August Term, 1917. Fi. Fa. Motion to strike off judgment. Exceptions to finding of an Auditor to whom was referred the rule and answer to strike off the judgment.

H. Clay Beistel, for plaintiff.

Rabe F. Marsh, for defendant.

Copeland,J.—This action was brought before J. B. Hagerman, a Justice of the Peace, on the 14th day of June, 1918, and is founded on a contract. A hearing was had before the Justice of the Peace and judgment was rendered for the defendant. The plaintiff took an appeal to the Court of Common Pleas of Westmoreland County, filing it in the Prothonotary's office on the 23rd day of July, 1918. On the 13th day of August, 1918, the plaintiff filed a declaration, or statement of claim, setting forth that the defendant was a corporation of the state of Pennsylvania and captioned his case as "Andrew Whitehead vs. Ormesher Auto Co., Incorporated." When the plaintiff took judgment for want of an affidavit of defense, without the word "Incorporated," as set forth in the statement of claim, and a levy made thereon by the sheriff. The defendant then filed a petition to strike off the judgment for the reason that he knew nothing about the proceeding and never had any notice of the appeal to the Common Pleas. A rule to strike off the judgment on that petition was granted, an answer was filed and a commissioner appointed to take testimony and report the facts to the Court.

The testimony taken before the commissioner shows that the plaintiff's statement of claim was handed to B. H. Thompson, defendant's attorney, by plaintiff's attorney, at the Union Depot, in Pittsburgh. The defendant attorney, seeing that the suit was against "Ormesher Auto Co., Incorporated" and that he did not represent any corporation by

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that name, did not notify the defendant, Ormesher Auto Company, for whom he had appeared at the hearing before the Justice of the Peace. It may be stated here that the Ormesher Auto Company was owned by William Ormesher, who was trading and doing business as "Ormesher Auto Com pany." The testimony before the commissioner also evidences the fact that William Ormesher never received any notice that judgment was had against him until the sheriff appeared at his place to make a levy. The record nowhere shows that he had notice of the filing of the statement of claim or the judgment taken thereon. He was entitled to notice of the filing of the statement of claim, so that he could have the privilege of filing an affidavit of defense, if he had any defense to make to the matters for which suit was brought, which we would presume he had, especially in view of the fact that the justice before whom the suit was instituted gave judgment in his favor. Whose fault was it that he did not have this notice? It was the fault of the plaintiff in captioning his case and in filing his statement of claim against "Ormesher Auto Co., Incorporated."

Our conclusion, therefore, is that these proceedings should be stricken from the record back to the time the appeal was filed; therefore, we will order and direct that the rule be made absolute, without the prejudice of the right of the plaintiff to file a new statement of claim and to proceed against the defendant as the suit originally was filed on appeal from the judgment of the Justice of the Peace.

It was argued at the hearing that the proceedings were de novo in the Common Pleas and that, therefore, the Court should allow an amendment by striking off the words "incorporated" and "a corporation of the state of Pennsylvania" in the statement of claim. If this suit is de novo in the Common Pleas it would be a suit against a corporation and to amend by striking off would have the effect of bringing a new party on the record and, of course, this must be refused.

Where a suit is brought against a corporation which does not exist a partnership of the same name cannot be brought on the record by a rule to amend the statement. This was decided in the case of Annie Markowitz vs. Ararat Dye Works, a case decided, a short time ago, in the Superior Court by his honor, Judge Head, but which as yet has not appeared in the advance sheet.

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The case of Wright vs. Eureka Tempered Copper Company, 206 Pa. 274, was cited as authority for the amendment. An examination of that case shows that the Eureka Tempered Copper Company and the Eureka Tempered Copper Works were both corporations and that they were both one party; that the only change in the name of the corporation was from "Company" to "works," and the only amendment asked for and which was allowed was a change in the word "Company" to the word "Works." This was not bringing a new party on the record and, of course, was allowed. You cannot sue a corporation and bring a firm or an individual on record because that has the effect of bringing a new party on the record. It might also be stated here that Mr. Thompson, the attorney to whom the plaintiff's statement of claim had been handed, did not enter his appearance on record; that it only got on the record by the fact that the justice had placed his name on the transcript as appearing for the defendant, without his knowledge, according to the testimony. So we have here a corporation sued, according to the plaintiff's statement of claim, that does not exist, and we have here an appearance that was not authorized and without the knowledge of the attorney himself. Consequently, it is only fair and right that the party should be given a day in court to answer and make any defense, if he has any to make; hence our reason for making the rule absolute.

AND NOW, to wit: the 15th day of March, 1920, after argument and after due consideration, it is ordered, adjudged and decreed that the judgment at No. 511 August Term, 1918, entered by the plaintiff against the Ormesher Auto Company be stricken off and that the execution issued at No. 47 August Term, 1919, set aside without prejudice to the right of the plaintiff to file a new statement of claim against the Orrmesher Auto Company as the defendant shown by the appeal from the judgment of the justice of the peace; the costs of the proceeding after the appeal was filed in the Court of Common Pleas to be borne by the plaintiff.

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COMMONWEALTH, FOR USE OF NALEY vs. BALSAMO

Forfeited recognizances.—Act of 30 July, 1842, P. L. 449—Adultery.

Under the Act of 30 July, 1842, P. L. 449, a distribution will be made of the fund realized from a defendant's forfeited recognizance in a case of adultery; first, to the legal costs incurred in the proceeding; second, to the person, agent or attorney prosecuting the same to final judgment; third, to the party injured, and fourth, the residue to the proper county.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 144 November Term, 1917. Exceptions to Auditor's Report.

Carrol Caruthers, for exceptant.

Crowell & Whitehead, contra.

Copeland, J.—This action was instituted to recover the amount of a recognizance given by the defendant for the appearance of John Wentner, who was a defendant at May Term, 1917, of the Court of Quarter Sessions. The defendant, John Wentner, failed to appear and the bond was forfeited, judgment was obtained on the bond, in the sum of $100.00, an auditor was appointed to distribute the fund under the Act of 30th July, 1842, P. L. 449, and the auditor's report on exceptions is now before us for disposition.

The contention of the exceptant here is that, after payment of the costs of this proceeding, the balance of the fund should be disributed to the County of Westmoreland. With this contention we do not agree. The Act of 1842, supra, clearly provides that the amount collected on the bond shall be taken into open court by the sheriff, or other officer having received the same, and then the judges of any court shall distribute the same in the following order, to wit: first, to the legal costs incurred upon the proceeding; second, to the person, agent or attorney prosecuting the same to final judgment; third, to the party injured, and, fourth, the residue to the proper county.

The auditor followed the Act of Assembly in making the distribution, and we think his distribution is right and equitable under the circumstances surrounding this case and that his report should be affirmed.

We held at the time we entered judgment that Annie Petschat, the girl upon whose body the assault was committed, was such a person who had suffered such loss and injury by the commission of the crime as to entitle her to be awarded out of the fund damages not only for actual loss incurred but for injury suffered by reason of the commission of the offence.

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The act clearly provides for the payment of damages with interest from the time the offence was committed. The offence here was committed on her body and the damage and injury she suffered was the direct result of her step father committing adultery upon her body and, therefore, she is entitled to be awarded out of the proceeds recovered from the bond given for the appearance of the offender in the Quarter Sessions the amount of the damages that resulted from loss of money and injury to her person.

Justice Black, in the case of Commonwealth vs. Robbins, reported in 26 Pa. 165, on page 168, said: "We can say this only of cases in which restitution or payment to the injured party is included in the criminal sentence; as, for instance, in larceny or bastardy."

This was a case brought under the Act of 22nd April, 1846, which was applicable only to Philadelphia county. This act is similar to the act under which this proceeding is instituted, except that it is narrower in its scope; but it is clearly the opinion of Mr. Justice Black in that case that bastardy was one of the cases which should be compensated out of a forfeited bond given for the appearance of a defendant in the criminal courts.

AND NOW, to wit: the 15th day of March, 1920, after argument and after due and careful consideration, it is ordered, adjudged and decreed that the exceptions to the auditor's report in this case be, and the same hereby are, dismissed and the money is directed to be paid out in accordance with the auditor's report, which we now approve.

SLIKER VS. SLIKER. (1)

DIVORCE. — DESERTION. — COLLUSION.

The malice of desertion in divorce arises from its being a perverse act of the one in refusing the performance of the marital obligations and duties which the other has the right to require. When such separations, however, has been the result of mutual arrangements, then each are equally at fault in this particular and neither can claim a legal right against the other.

Where the libellant's testimony is tainted with an attempt at collusion, such conduct, is in itself, ground for the dismissal of the libel: for example, where the libellant offered his wife a stipulated sum per month for the support of her boy if she would stay away from the hearing in the divorce proceedings and allow him to secure a divorce.

In the Court of Common Pleas of Westmoreland County. No. 377 August Term, 1917. Divorce.

Kline and Kline, for Libellant.

James L. Kennedy, for Respondent.

The case was referred to JOHN N. BOUCHER, Esq., as Master and he filed the following opinion:

The grounds alleged in the libel in this case are willful

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and malicious desertion on the part of the wife from the habitation of the petitioner, without any just or reasonable cause, and that such desertion has been persisted in for a term of two years and upwards, and that the respondent still continues to absent herself from the petitioner.

The Master does not believe that the desertion, in the first place, was willful and malicious on the part of the respondent, as required by law, to make out a case against her. In Reynolds vs. Reynolds, 67 Sup. 465, it is held that "a mutual consent to a separation not revoked by either party is fatal to an application for divorce upon the ground of desertion."

In Pearce vs. Pearce, 53 Sup. 129, it is held that a libel for divorce by a husband against his wife for desertion will be dismissed where the preponderance of evidence is in favor of the conclusion that, if the husband did not actually expel his wife from his house, she left by and with his consent and expressed wish. The same case further decides that a "guilty intent to desert is rebutted where a separation is encouraged by the other party or by mutual consent. The malice of desertion arises from its being a perverse act of the one in refusing the performance of the matrimonial obligations and duties which the other has the right to require. But when such separation has been the result of mutual arrangements and that is clearly established in the proof, then each are equally at fault in this particular and neither can claim a legal right against the other in consequence of an act in which he or she has been a guilty participant."

Now, it seems that the first separation came a few months after they were married, and was really brought about by his leaving the home while she sat on the stairs crying and her mother tried to persuade him not to go. It is in evidence that she remained in her home but a short time until she went to her mothers, for the reason that she could not remain there alone. Her testimony is, however, that she went back to the rooms to get his meals, but that he did not come for them.

In Michaels vs. Michaels, 65 Sup. 464, it is held that "where the libellant's testimony is tainted with any attempt at collusion, that is, where he attempts to have his wife stay away from the trial, etc., such conduct is in itself ground for dismissal." Now, the libellant admits that he offered his

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wife fifteen dollars a month for the support of her boy if she would stay away from the hearing and allow him to get a divorce.

In McCampbell vs. McCampbell, 64 Sup. 143, it is held that "where a husband takes his wife and baby to live in his parent's home, * * * but being made unhappy by the unkind treatment of her mother-in-law, tells her husband that she will either have to stay and suffer a nervous breakdown, or go to her own home, and the husband tells her to suit herself, and after she has returned to her own home, writes her a formal letter stating his willingness to provide her a comfortable home, and she replies in an affectionate letter that she is willing to accept, but that the home must be separate from relations, and the husband does nothing further in the matter, he cannot thereafter maintain an action for divorce against his wife for desertion." There was a great deal of talk in this case about getting a larger house and going to housekeeping after the baby was born, after the baby got well and all this, both parties seeming to talk in the same line, but the home really never materialized.

Furthermore, in McBrien vs. McBrien, 63 Sup. 576, it is held that "where a husband and wife have separated by mutual consent, the husband cannot afterwards make out desertion by the wife because she made no response to a letter in which he said 'I will have a house somewhere on the road, and if you wish you and your children can come' without any statement as to the locality of the house or its character; and especially so where it appears the husband did not have a house at the time the letter was written, but merely contemplated renting one" the husband claiming divorce on the ground of desertion.

In Graham vs. Graham, 153 Pa., 450, the Court says that "there was a desertion by the husband may perhaps be conceded, but the evidence fails to show that there was a willful and malicious desertion within the meaning of the Act of Assembly." Now it seems to the Master that there was no willful and malicious desertion on the part of the wife in this case.

In the case of Angier vs. Angier, 63 Pa. 450; it is said:

"If it should be shown that the application is not based upon the grounds stated, but that the causes are set out to advance a scheme to make out a technical case, the court will not permit it to be successful. The husband cannot

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claim a divorce based on his own schemes to promote it; this would be taking advantage of his own wrong." There is testimony on the part of several witnesses that he has been going with another woman named Mary White, and he himself admits that he goes to see her probably once in two weeks. When the question was put to him, perhaps unfairly, as to whether he was engaged to be married to her, or going to marry her if he got this divorce, he answered that that was his business. It seems to the Master, therefore, that the ruling in Angier vs. Angier would be against him. In Middleton vs. same, 187 Pa., 612, it is said: "Where a husband has suggested and encouraged a separation between himself and his wife, he cannot charge her with willful and malicious desertion." And in Musgrove vs. 185 Pa., 260, it is held that "a perfunctory notice to return, after a separation, is not sufficient." It is further held in 14 Cyc. 616, that "it has been firmly established by the decisions that if either expressly or by implication from the circumstances the complainant consents to the original separation or to its continuance, and that consent is not revoked, there is no such desertion as warrants a divorce."

We believe all these cases have a bearing on the case at bar and that they decide it definitely, and for that reason the Master has been impelled to report as his opinion that this divorce should not be granted.

Exceptions were filed to the report of the Master and were dismissed in the following opinion:

> McCONNEL, J.—AND NOW, 15th June, 1918 upon due consideration of the within testimony, the Court is convinced that the report of the Master, both as to the law and the facts of the case is correct, and that the application for divorce should be refused. A divorce accordingly is refused and the application is dismissed at the costs of the applicant.

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SLIKER VS. SLIKER. (2)

DIVORCE. — RES ADJUDICATA.

Where it appears from an inspection of the records in a case in divorce that the grounds set forth in the petition are the same as those quoted in a former action in which a Decree was entered but no appeal from such question res adjudicata. In such a case the prayer of the Respondent in her answer to dismiss the libel must be granted.

In the Court of Common Pleas of Westmoreland County. No. 63 May Term, 1920. Divorce.

P. K. Shaner, for Libellant.

James L. Kennedy, for Respondent.

Copeland, J.:—From an inspection of the records in this case and at No. 337 August Term, 1917, Court of Common Pleas of Westmoreland County, we find that the grounds set forth in the petition or libel for a decree in divorce are identically the same. The action in divorce at No. 337 August Term, 1917, supra, so far was proceeded in that a final decree was entered in favor of the respondent. That decree was not appealed from, and therefore, the question as raised in that issue is now res adjudicata. The same question again is raised here in this proceeding, but it heretofore finally having been determined in the former action, to which we have referred, it now cannot be heard, and the prayer of the respondent to dismiss the libel must be granted.

AND NOW, to wit: the 20th day of March, 1920, after argument and after due consideration, it is ordered, adjudged and decreed that the libellant's petition, as filed at No. 63 May Term, 1920, be, and the same hereby is, dismissed at his costs.

SWIFT & CO. vs. KAVWRAS.

PRACTICE. AFFIDAVITS OF DEFENSE. ACT OF 14 MAY, 1915 P. L. 483, SECTION 12.

Where in assumpsit against an alleged partnership, one of the alleged partners files an affidavit of defense denying that he was a member of the firm at the time the goods were sold, for which the action is brought, the partnership having earlier been dissolved on a certain day, affiant's co-defendant becoming the sole owner and proprietor of the business, and alleging that notice therefor was given to the plaintiff, it was held, that such affidavit of defense was sufficient to prevent judgment.

The 12th Section of the Act of 14 May, 1915, P. L. 483, provides that the affidavit of defense shall be as brief as the nature of the case will admit and it is not necessary for the defendant to set forth the evidence that is relied upon to establish these facts. All that is necessary is a statement of facts which goes to the merits of the case and sets forth good grounds of defense.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 557 November Term, 1919. Motion for judgment for want of a sufficient affidavit of defense.

C. L. Hugus, for Plaintiff.

Eicher and Eicher and Daniel Reamer, for defendants.

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COPELAND, J.—The plaintiff in this case filed a praecipe for summons in assumpsit on the 24th day of October, 1919. On the same day it filed its statement of claims to recover $805.94, together with interest thereon from the 14th day of June, 1917, for meats and merchandise sold and delivered by the plaintiff to the defendants, who were engaged, during the years 1916 and 1917 as co-partners in buying and selling it at retail meat and other merchandise in the borough of Monessen.

An affidavit of defense was filed on the 10th day of November, 1919, by Nick Kologiros, one of the alleged partners in The Elite Meat Market, in which he sets forth at length that he is not indebted to the plaintiff for the amount set forth in the statement indebted to the plaintiff for the amount set forth in the statement of claim or any other sum and that the proceedings in bankruptcy referred to in the plaintiff's statement of claim, were against The Elite Meat Market; that it was not with the consent of him, Nick Kologiros, that the proceedings in bankruptcy were commenced and prosecuted, and that he has no knowledge or information relative to such proceedings.

On the 26th day of November, 1919, at the instance of the plaintiff a rule issued for judgment for want of a sufficient affidavit of defense. The plaintiff files three reasons why judgment should be entered on the rule. The first reason is:

"1. Defendant filing the affidavit of defense does not deny partnership but alleges that partnership was dissolved and does not state how, but alleges plaintiff had full knowledge but does not state how notice was given and if given that it was in accordance with the law in such cases made and provided."

We do not think this reason is tenable, as the plaintiff clearly sets forth in his affidavit of defense that he was not a partner at the time the goods were sold. The statement attached to the plaintiff's statement of claim shows that the goods for which this action is brought were sold to The Elite Meat Market between the 30th day of April, 1917, and the 7th day of May, 1917, inclusive. The fourth and fifth paragraphs of the plaintiff's statement of claim are as follows:

"4. That the amount aforesaid is due and owing by said defendants to the plaintiff on an open book account for meats

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and merchandise sold and delivered by said plaintiff to said defendants; the bills hereunto attached and made part hereof show the items thereof as they appear on plaintiff's books of original entry and show the dates or approximate dates of the sales and deliveries to the defendants and show the prices charged which were just and reasonable prices and charges and which prices and charges the defendants had agreed to pay, and showing an indebtedness in the sum aforesaid, with interest as aforesaid, from the average due date, said merchandise having been sold on a credit basis of weekly payments;

"5. That thereafter, to wit, on or about May 15th, 1917, in the District Court of the United States for the Western District of Pennsylvania, a creditor's petiion in bankruptcy was filed against said defendants, individually and as partners trading as the Elite Meat Market at No. 8704 in Bankruptcy, and thereafter in said proceeding on or about August ———, 1917, the said defendants, individually and partners trading as the Elite Meat Market were in said Court adjudged as bankrupts; that thereafter in said proceedings the plaintiff herein obtained as a creditor for and on account of the sum owing as aforesaid Fifty-six and 50|100 ($56.50) Dollars, credit for which dividend is shown in said attached bills."

The affidavit of defense filed by Nick Kologiros sets forth these facts: That the partnership existing between the codefendant James Kavwras, and him was dissolved on or about the 1st day of October, 1916; that at that time he sold and disposed of all his rights, interest and holdings in the co-partnership; that his co-defendant then became the sole owner and proprietor and continued the business, and that the plaintiff was notified of the dissolution of the partnership. These are statements of fact in the affidavit of defense. If supported by evidence there should be no recovery against Nick Kologiros.

The twelfth section of the Practice Act of 1916 says, inter alia: "The affidavit of defense shall be as brief as the nature of the case will admit."

It repeatedly has been ruled by the courts that it is only necessary to set forth in an affidavit of defense the facts which would entitle the defendant to judgment if they are not denied by a reply or contradicted by evidence at the trial.

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It is not necessary for the defendant in his affidavit of defense to set forth the evidence that is relied on to establish the facts. All that is necessary is a statement of facts which go to the merits of the case and that set forth a good ground of defense.

The second reason for judgment is: "2. Defendant does not deny adjudication in bankruptcy and that at the time defendant was a partner as therein adjudicated."

This reason also is not tenable, for the statement of claim shows that the bankruptcy proceedings were begun on a creditor's petition on the 15th day of May, 1917, after the goods for which recovery is sought in this case were sold and a long time after the dissolution of the partnership, as set forth in the affidavit of defense. In the seventh paragraph of the affidavit of defense the defendant denies that he had any knowledge of those proceedings, in that they were not instituted and prosecuted with his consent or with his knowledge. If that be true then the defendant would not be a partner to the proceedings and would have no bearing upon the merits of the case.

The third reason for judgment is: "3. Defendant does not allege that as said partner he was ever discharged from said bankruptcy."

We cannot see how an allegation in the affidavit of defense that he was discharged from bankruptcy would help the defendant in this case. Even though he were not discharged, if he were not a partner in the firm of The Elite Meat Market at the time these goods for which this action is brought were sold and delivered and the partnership had been dissolved before with the knowledge of the plaintiff, he would not be liable, either in this proceeding or in the bankruptcy proceeding for this claim. If he is liable at all under the bankruptcy proceedings he would be liable for the debts that were incurred prior to the dissolution of the partnership, but would not be liable for any debts incurred after the dissolution.

This whole matter comes back to whether or not there was a dissolution of the partnership at the time alleged in the affidavit of defense and whether the plaintiff had knowledge of that dissolution. If there was a dissolution and the plaintiff had knowledge of that dissolution when these goods were furnished six months afterward to his co-defendant, Nick Kologiros would not be liable in this action.

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It is our opinion that the affidavit of defense as filed by Nick Kologiros sets forth a good ground of defense, and, if the facts therein set forth are proven at the trial, there can be no recovery against him and that this rule, so far as he is concerned, should be discharged and we according so order.

AND NOW, to wit: the 15th day of March, 1920, after argument and after due and careful consideration, it is ordered, adjudged and decreed that the rule for judgment for want of a sufficient affidavit of defense be, and the same hereby is, discharged, so far as this action concerns Nick Kologiros, one of the defendants in this case, at the cost of the plaintiff.

FISHER VS. PITTSBURGH COAL COMPANY

DEEDS.—MONUMENTS.—"OUT-CROP" OF COAL. QUANTITY OF LAND CONVEYED AS EVIDENCE OF BOUNDARIES—FUNCTION OF COURT AND JURY. IN RELATION TO BOUNDARIES IN DEED

If there was upon land a visible rock, tree, building or other fixed and visible or otherwise well-defined object, with a definite and permanent fixed location, and a vendor or vendee were seeking to locate for the purpose of conveyance a line that would fall wholly within the vendor's own land, and such negotiating parties could, for the purpose of description of the subject matter of their contract, utilize such a monument to define the location of such a line of severance, and did actually mention it for that purpose in the deed, it would be there entitled to control over courses and distances and computed area, for the contracting parties are least liable to have made a mistake in regard thereto, and, with respect thereto, are presumably less subject to the error of others in regard to the other terms of description which may have been employed in the deed.

Where in a conveyance of coal one of the calls in the deed recites an "out-crop," unless that be a point where the coal actually and visibly outcrops, there is less certainty and less definiteness of intended location than is usually ascribed to ordinary visible monuments, natural or artificial, and where both parties to a controversy claim different locations of the "out-crop," which could be found almost any place where the seam of coal may underlie the surface, such point would not be a precise and distinct form of monument for fixing such locations.

The rule that fixed monuments are to prevail over courses and distances in fixing the boundaries of land applies with less force to those monuments which are artificial than to the natural and permanent objects and fails entirely, when from the designation of quantity or other elements of description, it is apparent that the courses and distances are correct.

The quantity of land in a conveyed tract is a circumstance which may not have much weight in a question of title, but where the question is one of boundary and if there be two lines, one corresponding with the quantity of land in the deed, and the other largely in excess, such evidence of quantity would have weight in determining the true line, especially when assisted by other evidence.

To lay down the hard and fast rule that only monuments are determinative elements of a description and that all other elements are valueless is to make it of more importance than the underlying intent of the contracting parties as expressed by the terms of the deed and all of them for all the terms used by the parties meant to have some meaning and what their meaning is when allowing each element to perform its intended function is alone the proper office of construction.

When the question is what the boundaries of a given piece of land, which has been conveyed by deed, are, it is a question for the court; where these boundaries are is a question for the jury. What is the true location of a survey is not one of construction nor a question of law, but a fact; and whether a particular piece of land is included within the boundaries mentioned is a question for the jury.

In the Court of Common Pleas of Westmoreland County. No. 469 November Term, 1919. Motion for judgment n. o. v.

H. H. Fisher and Rabe F. Marsh, for plaintiff.

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Gaither & Whitten, Robert L. Greer and Don Rose, for defendant.

McConnell, P. J.—In this case, there is a motion, together with recited reasons, for a new trial, and also a motion for judgment n. o. v.—on the whole record—filed by the defendant, against whom the verdict of the jury has been rendered for the premises in dispute. These motions invite only a reconsideration of the matters that received full consideration at the time of trial, and, therefore, they need not be elaborately stated.

The defense is built around the rule of construction which appraises the relative probative value of monuments on the ground, as compared with courses and distances, computed area and other matters of description in the deed of McClain to Stoner, through which the severance of the title to the strata was effected. It is contended by defendant herein that a line of that deed on the western end of the tract conveyed, which is given in that deed as being 8 perches long, should, nevertheless, be carried by the same course 176 feet further south, in order to reach the call of the deed for an "outcrop" of the coal which "outcrop" the defendant says, is there located—and that there is no "outcrop" to be found at the end of the 8 perch line which the deed recites, and which the plaintiff claims is the correct measurement of that line.

From the end of a line after it has been extended 176 feet beyond the termination of the 8 perch line, the defendant, in defining the extent of its claim of ownership, employs, in order to comprehend the coal which it claims, additional lines with courses and distances eastwardly along the southern side of the conveyed tract, not mentioned at all in the deed, and does not utilize at all, for the purpose of description of its claim, the courses and distances along the southern side of the tract, starting at the end of the 8 perch line, and running in an easterly direction—which last mentioned courses and distances are, in fact, expressly mentioned in the deed, as being a part of the description of the property intended to be conveyed to Stoner.

The asserted authority for thus bringing into the case distances and courses not mentioned in the deed itself, and for ignoring distances and courses that are expressly mentioned therein, defendant claims, is a construction compelled by well

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recognized rules, in order that the calls of the deed may be satisfied by reaching the outcrop at the end of the 176 foot extension, and from thence following the line of the "outcrop" along the southern side of the tract. If this last mentioned construction of the description in the deed is the correct one, then its application would be effective to give Stoner—now the defendant—more than double the area of coal that the deed mentions, when defined by the courses and distances and the computation of area expressly mentioned in the deed. To make that to be the proper construction, of course, it must appear that the "outcrop" and the "cropline" contended for are so located, and that they are the "outcrop" and the "outcrop-line" which the contracting parties meant to designate as a part of the description of the subject-matter of the conveyance. There is no ambiguity apparent from a mere reading of the deed, for we cannot say from such mere reading that the end of the 8 perch line is not identical with the location of the outcrop that the parties to the deed meant to designate.

It is due to a showing of facts dehors the terms of the deed, that there is imported into the description of the subject matter of the contract, by the defendant's contention, any ambiguity whatever.

An ambiguity thus originated makes it proper that, not only the terms of the contract, as they are written in the deed, should be carefully inspected, but that there should also be inquiry into the circumstances attending the making of the deed itself—to the extent that those circumstances may shed evidentiary light on the question of intent in the use of the words actually employed in the deed.

Both the parties to that deed are long since deceased, and their declarations on the land itself, while living, with respect to the limits of their respective titles—especially when indicated in the presence of each other—become of evidentiary value and admissible in evidence at the trial. The surveyor who made the survey in their presence and at their instance, in preparation for the making of the conveyance, also wrote the deed intended by them to define their respective titles—and the terms therein employed are—according to the testimony of the surveyor—identical with the lines of survey made by him on the ground, at the making of the survey, and that it was intended, according to their declara-

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tions to the witness, and to each other than made—by the parties that the subject-matter of the conveyance was to be comprehended within the surveyed lines which the courses and distances expressed in the deed, and that it was not the intention of the parties to therein describe any other or greater subject-matter of the contract.

The surveyor says both parties so understood and desired to express themselves with regard to their respective titles from what they said and did in the presence of each other upon the ground. It is conceded that as the title to the strata was then parted it is now held by the parties to this action.

This testimony of the surveyor, of course, agrees with the contention of the plaintiff, and disagrees with the contention of the defendant. The defendant, in support of the correctness of its contention, emphasizes the fact that the covering of the coal at the end of the 8 perch line was 57 feet deep, and that, therefore, in no proper sense, could the "out-crop" be there, and, further, that the new courses and distances claimed by it as being descriptive of the southern line of its claim, and which are not anywhere so expressed in the deed would be efficacious to carry the southern line along the "out-crop-line," and that the ignored courses and distances carried by plaintiff's surveyed line, and which are incorporated in the description in the deed along the southern boundary of the tract, as plaintiff claims it to be, would not fall on the "out-crop" line at all.

When undisputed monuments are established, they must govern, although neither courses nor distances, nor computed contents, correspond—but our question in this case has respect to the establishment of such monuments. There is no question about the application of the rule, when the monuments are shown to exist, but their existence and location are the things to be demonstrated by the evidence in this case.

"The order of applying descriptions of boundaries is, first, to natural objects; second, to artificial marks; and, third, to courses and distances given in the deed." 3 Washburn Real Property, page 388, sec. 2325.

"Where boundaries of land, as mentioned in a conveyance, are fixed, known and unquestionable, monuments, although neither the courses nor distances, nor the computed contents,

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as described in the conveyance correspond therewith, the monuments will govern. With respect to courses, from errors in surveying, variation of the needle and other causes, different surveyors often disagree. The same observations apply to distances arising from the inaccuracy of measures, or of the party measuring; and computations are often erroneous. But fixed monuments remain; about them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments about which there is no dispute." Perman v. Wead, 6 Mass. 131.

"What is most material and certain in a description will prevail over what is less. The object is to ascertain the intent of the parties, and the rule to find the intent is to give most effect to those things about which men are least liable to mistake." Deppen v. Boger, 7 Sup. 434.

If there was a visible rock, tree, building, or other fixed and visible or otherwise well-defined object, with a definite and permanently fixed location, and a vendor or vendee were seeking to locate, for the purpose of conveyance, a line that would fall wholly within the vender's own land (for in this case there are on this line no other called-for adjoiners) and such negotiating parties could, for the purpose of description of the subject-matter of their contract, utilize such a monument to define the location of such a line of severance, and did actually mention it for that purpose in the deed, it would be there entitled to control over courses and distances and computed area—for the contracting parties are least liable to have made a mistake in regard thereto, and with respect thereto, are presumably less subject to the errors of others in regard to the other terms of description which may have been employed in the deed.

But in regard to the location of an "outcrop"—unless that be at a point where the coal actually and visibly "crops out" —there is less certainty, and less definiteness of intended location, than is usually ascribed to ordinary visible monuments, natural or artificial. Contracting parties are more liable to error and mutual misunderstanding, with respect to the location of things that are invisible, and hence are less likely to employ such things as descriptive monuments in defining their intention with respect to what shall constitute the subject-matter of conveyance—than they are with re-

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spect to the use, for that purpose, of things having a location that is fixed and visible on the surface.

It is contended by defendant that the coal at the end of the eight perch line is 57 feet deep, and, therefore, there is no outcrop there. But the defendant, through other lines, also seeks to locate, within vendor's land, an "outcrop" at the end of 176 foot extension of that eight perch line—which "outcrop" is not shown to be any more visible—or ever to have been any more visible to the contracting parties, than would be the alleged "out-crop" at the end of the eight perch line—against which the defendant lodges its objection.

Both parties claim up to a point in the then-vendor's coal —invisible to the eye. If an "outcrop" is properly understood to be where the coal visibly crops out—then neither party traces the line to any such point, and the construction to be made is a choice between two descriptions, both of which are inaccurate insofar as verbal description is concerned. The points at which both the conflicting measurements stop, are equally invisible, and both fall wholly within the then-boundaries of the vendor's premises. Each of these points for the termination of that line is either correctly or incorrectly called an "outcrop," and yet at neither is it made to appear that the coal visibly crops out. Whether the covering over the coal at the end of the 176 feet extension of the line is less than it is if the end of the line is considered to be at the end of the eight perches, where it is said the covering is 57 feet deep—may not be a very material distinction with respect to the relative value of the points in fixing the location of a boundary line, when we are considering what the contracting parties must have meant when they fixed the terminating point in the vendor's coal, and called it an "out-crop," although in neither case did the coal there actually crop out, but in both cases remained invisible to the contracting parties.

It may not, as a rule, be safe to hold parties to the accuracy of lexicographers in the use of the words which they have employed in expressing their contracts—but, in constructing their contracts when made, it is not a vice in construction to bear in mind how the lexicographers have defined some the words employed in the agreement. In the Standard Dictionary, we find this definition of the word "outcrop:" "The appearing at the surface of a stratum, or series

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of strata, or of a vein, or ore-deposit of any kind." The same word, when used as a verb, is also thus defined: "To crop out, or up; specifically in geology, to come out to the surface of the ground; said of a strata."

In that sense of the word, "outcrop," neither of the parties claim to employ it, in defining what they respectively claim. When coal is bought and sold for mining purposes, it is a well-known mode of procedure for the contracting parties to excise from the main body of the coal which is the intended subject-matter of conveyance, the red—or less merchantable coal which lies nearest to the points where erosion has carried a portion of the seam away, and that portion which is thus excised is conveniently denominated "outcrop," or "crop coal." Where the conventional line of severance to be run is fixed only by agreement, and, when run, it may in exceptional cases, throw a considerable body of mineable, although inferior, coal into the portion of the bed conveniently called "outcrop" coal; but, whenever the parties by their convention see fit to locate this excising line, it is not to be legally controverted that the coal—whatever its quality may be—that is located outside of this excising line—remains the property of the original owner of the seam, and only that part thereof that lies within the boundaries so fixed, passes in title to the vendee by the deed of conveyance, and that alone is intended to be paid for by the vendee.

It was a development of the late war, that even "red-coal," such as is usually excluded as "crop-coal" finds as ready a market as any other kind—but such recent development would not serve to change the extent of a title made and defined by deed more than thirty years ago. The time when a deed was made and the then-existing customs and circumstances constitute what is to be considered in searching for the meaning of the parties to a deed, in employing the terms of description which they have made use of to define the subject matter of their conveyance. That any Westmoreland County jury should be ignorant of the customs pertinent to the mode of marketing coal lands and any changes therein that may have developed in the progress of the years intervening the making of this deed, and the present time, is an unwarrantable assumption.

By the contention of both the litigating parties, in so far as disputed lines, courses, distances and the location of mon-

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uments are concerned, they lie wholly within the boundaries of the then-vendor's own land, and no pre-established line of any adjoiner is called for. It is said in argument, that it does not militate, in any way, against the paramount authority of the "outcrop" as claimed by defendant, because it was wholly under ground, inasmuch as the subject-matter of the conveyance lay wholly under ground—but that some claim could be made in behalf of what plaintiff calls the "outcrop" at the end of the eight perch line. While the subject-matter of the conveyance, the seam of coal, lies wholly out of view and under the surface of the ground, yet its location is wholly intended to be defined in the deed by surface lines, unless the "outcrop" is a thing which touches the seam itself.

A jury could well conclude that, in the use of this term and its derivatives wherever employed in the deed, that parties had reference to a conventional "outcrop," rather than to an "outcrop" in the strict sense of the word. In fact, such a conventional use of the term is what is claimed by each of the parties in support of the respective claims of the two parties to this action. They, however, disagree about the location of this conventional "outcrop," and the proper boundary lines are determinable from its proper location. The location contended for by the defendant would give the subject-matter of the conveyance a much wider area than would the location contended for by the plaintiff.

If there was nothing else in the case, the nature of this controversy would carry the determination of the case from the court to the jury. But there are other rules of construction which neither the court nor the jury should ignore in disposing of the pending controversy: "The rule of law is that a deed must be so construed, if possible, that no part shall be rejected." 3 Washburn Real Property, sec. 2313. With reference to this rule, Justice Tilghman said in an early case, (Wagner v. Wagner, 1 S. & R. 375): "One of the most important rules of construction of deeds is to so construe them, that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself; therefore, we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction." In Walters vs. Bredin, 70 Pa. 238, Chief Jus-

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tice Thompson, said: "A deed must be so construed, if possible, that no part shall be rejected. 6 Wright 387; 1 S. & R. 374. This is elementary."

By defendant's contention, the recited courses and distances along the southern boundary, as they are recited in the deed itself, are not made use of, and other courses and distances not mentioned in the deed, at all, are made use of —for the alleged reason that they follow the "outcrop" line. The plaintiff claims that the courses and distances given in the deed, and which are ignored by defendant, do follow what the parties considered and called—though perhaps inaccurately—the crop line. In the strict sense of the term, the crop-line contended for by each of the parties to this action would not, in its course undeviatingly adhere to a line located by any actual cropping-out of the coal, but on the contrary, some coal would necessarily lie outside of the line so contended for. If the "outcrop" and the "outcrop line" mentioned in the deed are to be regarded as monuments, it would not be possible for the Court, as a matter of law, to declare that one of these locations, to the exclusion of the other, is the true location. The question of location is a question of fact, and not a question of law. Since such an "outcrop" as both parties claim to be the true one, could be found almost any place where the seam of coal may underlie the surface, it would not be a very precise and distinct form of monument for fixing location at best.

A third matter of description is the area as computed in the deed. Considered with reference to its probative value in ascertaining the true construction of a deed with reference to what property is intended to be conveyed, the computation of area, as recited in the deed, is the lowest element of description in value, of all the terms of description therein employed. However, special circumstances may sometimes augment its probative value for some purposes, and such special circumstances are not wholly lacking in this case.

In the case of Kennedy v. Lubold, 88 Pa., at p. p. 256 and 257, Justice Agnew used this language, with reference to the case thereunder consideration: "The learned judge also fell into error in refusing evidence of the number of acres contained in defendant's claim. He claimed a corner as the northwest corner of this tract, fifty-six perches east of the hickory. This would make a very large difference in the area

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or quantity of his land. Quantity is a circumstance of slight, often of no weight, in a question of title, but it may have a marked effect where the question is one of boundary. If there be two lines, one corresponding with the quantity of land in the deed, and the other largely in excess, the inference would have weight in determining the true line, especially when strongly assisted by other evidence."

The question of the coal constituting the subject-matter of the conveyance, as claimed by the defendant, is more than double the area of it according to plaintiff's claim—and which is right, is determinable by the intended location of the disputed lines. On that controversy, area has an augmented probative value. In addition to this, if the area as mentioned in the deed be taken as the area, and its value per acre be computed, at the rate of $100.00 per acre—(the rate that the surveyor says was the agreed upon price that Stoner was to pay per acre for the coal purchased)—the computation will produce a result that will correspond with the consideration mentioned in the deed, but, taking the area to be as the defendant claims it to be, the computation would not so result.

"The rule that fixed monuments are to prevail over courses and distances in fixing the boundaries of land, applies with less force to those monuments which are artificial, than to the natural and permanent objects, and fails entirely, when from designation of quantity, or other elements of description, it is apparent that the courses and distances are correct." Fallon's Pa. Law of Conveyancing, p. 159, sec. 132, citing Towner v. Baker, 27 Am. Rep. 226; McCoy vs. Hance, 28 Pa. 149; Hagey v. Detwiler, 35 Pa. 409.

The object of description in a deed is to identify the subject-matter of the conveyance, and the object of all proper construction is, from all the terms of the deed, to get at the intent of the parties, in that respect, using for that purpose, all that they have said in the deed—aided sometimes by the circumstances attending the making of the deed and which circumstances presumably operated on the minds of the parties, at the time.

Though some of the terms of description—for reasons already stated—are entitled usually to more probative value than others, yet, in the end, the true construction is ascertainable by the totality of their combined effect, and not

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wholly and exclusively by any one term, when it is irreconcilable with the other terms of description. To lay down the hard and fast rule that only monuments—(and in this case their location is the bone of contention)—are determinative elements of a description, and that all other elements are valueless, is to make the rule contended for more important than the underlying intent of the contracting parties of which they have intended the terms of the deed—and all of them—to be but instruments of evidence of what their intent is. All the terms used are, by the parties meant to have some meaning, and what their meaning is, when allowing each element to perform its intended function, is alone the proper office of construction. Some elements have higher probative value than others—because there is generally less likelihood of mistake about them—but each and all have a function—greater or less—to perform, according to the presumed intent of the parties. It is not the function of either court or jury to devise a contract for the parties, but it is their function to so use what the parties to a deed have made to be the intended enduring instrument of evidence of what their actual contracting was, as to give efficacy to that intent—and not to something else, which they have not shown they meant. "No rule can be invoked for the construction of a deed which tends to defeat the intention of the grantor." Elliott v. Jefferson, 64 L. R. A. 136.

The rules must be so used as to aid rather than to hinder the discovery of what the deed, in its entirety, is the designed evidence of, that is to say, the meaning of the parties as to the property intended to be conveyed.

In the last place, the determining matter in this case is a mixed question of law and fact, and is, therefore, for the determination of a jury. The concrete question herein is what is the true location of the southern boundary line of the coal conveyed to Stoner? When that is once properly located, we know what particular body of coal was conveyed, and we cannot know that until that line of location is established by legal authority.

When the question is "what the boundaries of a given piece of land, which has been conveyed by deed, are, it is a question for the court; where these boundaries are, is a question for the jury. What is the true location of a survey is not one of construction, nor a question of law, but of fact; and whether a particular piece of land is included within the

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boundaries mentioned, if these are in dispute, is a question for the jury." 3 Washburn's Real Property, sec. 2343.

The defendant insists there is a latent ambiguity, in consequence of the alleged fact that a line of description should be carried 176 feet farther than the deed calls for, in order to reach a call for an outcrop. Where a latent ambiguity is claimed, parol evidence becomes necessary, and for that reason the case goes to the jury. Kountz vs. O'Hara Street Ry., 48 Sup. 139. "Ordinarily, the construction of a deed, or other document, is for the Court, but where boundaries are to be ascertained, and where the intention of the parties is to be discovered in the light of conditions and circumstances extraneous to the documents, the case is for the jury." Cake vs. Sunbury Borough, 43 Sup., 95.

"What constitutes a boundary in a deed is a fact for the jury, and may be proved by any kind of evidence which is competent to prove any fact. 3 Washburn Real Property, sec. 2324. Brown vs. Willey, 42 Pa. 209.

Where the case necessarily goes to the jury—as this does —the jury is to apply the terms of the deed in the same spirit as if its construction under the facts of a case was for the Court as a question of law. We have said that, which of the two "out-crops" as contended for by the disputing parties to this action, could not be a question of law for the Court, but must be ascertained by a jury. In dealing with a question of that kind, this has been said: "Where there are two conflicting monuments, and one corresponds with the courses and distances, that one should be taken, and the other rejected as surplusage." Zeibold v. Foster, 24 S. West R. 155.

The jury have so dealt with the question in this case, and their decision is in favor of the contention of the plaintiff, and against the contention of the defendant. It is not possible for the Court to say, in view of the character of the evidence, that conclusion was unwarranted. Therefore, for the reasons above given, the first three reasons for a new trial are overruled.

With respect to the fourth reason, it is only necessary to say that, if the court, in submitting the case to the jury, minimized the obvious claim of defense that the case was to be determined by the practically exclusive application of an alleged rule of construction that would in its application in the

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mode claimed for have ignored the utility of many of the terms of description actually employed in the deed to define the subject-matter of conveyance. Such minimizing would only be operative to the end that the case should be submitted to the jury in a proper form—and would not at all be conducive to the violating of any legal right which the defendant had any real ground to insist upon. However, we are not aware of the Court's having either unduly emphasized or minimized any portion of the evidence in its charge to the jury, and, in the absence of any more specific allegation, the fourth reason for a new trial is also overruled.

We have already said that the case was one for the jury, and not one exclusively for the Court, and, therefore, the fifth reason, wherein it is alleged that the Court erred in not giving binding instructions for the defendant, is also overruled.

For reasons already given, the motion for judgment n. o. v. in favor of the defendant must also be overruled.

And now 3rd April, 1920, upon due consideration, the motions for a new trial and for judgment n. o. v. are denied. Let judgment be entered on the verdict, on payment of the jury fee.

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LITTLE VS. WEST PENN RAILWAYS CO.

NEGLIGENCE.—STREET RAILWAYS.—RIDING ON THE RUNNING BOARD—DUTY OF COURT AND JURY.

When a passenger on a street car, without excuse, rides upon a running board of a car, by such unnecessary act on his part, he takes on himself all the risks incident to such unconstrained position and in case of injury from such special and incident damages, he must himself bear the loss and cannot legally compel the carrier to assist him.

When a passenger on a street car is injured while occupying a place on the running board, in a suit for damages therefor, he has resting on him the burden of showing that the injury that then befell him was traceable to the negligence of the defendant, for, under those circumstances, the law will not, of itself and without proof, presume that the injury was the result of the defendant's negligence as it would do if at the time the injury was received, the passenger had been within the body of the car where passengers are presumably afforded a place of safety by the carrier.

An injured passenger, who at the time occupied the running board, may by evidence show that notwithstanding his presence there, he is still entitled to have his safety protected by the carrier and he successfully lifts that special burden of proof resting on him, owing to his injury having been received when he occupied the running board, when he shows evidence that, owing to the crowded condition of the car, it was not reasonably practical for him to find room inside of the car.

If the accident, which occurred to the passenger while upon the running board of the car, was due to the ordinary lurching of the car, and that was the proximate cause of the accident, there could be no recovery.

Where the facts are simple, and the evidence by which they are presented is involved in no uncertainty, their legal value is for the Court to determine, but where the evidence is conflicting or the facts are left in doubt, the conclusions are to be drawn by the jury.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 96 May Term, 1918.

Motion for new trial and for judgment n. o. v.

Robbins & Wyant, for plaintiffs.

Moorhead & Smith, for defendant.

McConnell, P. J. There are two reasons assigned for a new trial, viz: 1. The verdict is against the weight of the evidence. 2. The verdict is excessive in amount, having due regard to the physical condition of the plaintiff before the accident, and at the time of the trial.

There has also been filed in the case a motion for judgment n. o. .v, in the following form: "And now, to wit: December 12, 1919, comes the defendant, by its counsel, Mess. Moorhead & Smith, and moves the Court to have all of the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment non obstante veredictio upon the whole record in favor of the defendant —the Court having, at the trial of the case, declined to affirm defendant's points for binding instructions."

The whole record having been made up by the filing of the transcript of the testimony on the 9th of March, 1920, both the above motions now come before the Court for disposition.

The jury, dealing with conflicting evidence on the point —have found, from a consideration thereof, that plaintiff's

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position on the running board of the car at the time of the accident, was not voluntary, but was compelled by reason of the crowded condition of the car, and, therefore, that such a position by the plaintiff at the time of the accident, did not demonstrate that he was, for that reason, guilty of any contributory negligence.

Although the existence of such compulsion was a point disputed in the evidence, yet the decision of that point was a matter only for the jury to determine, and the Court would not now feel itself to be warranted by the evidence, to grant a new trial because there had been at that trial a conflict in the testimony on that particular point—nor do we now understand the reasons for a new trial to be specially designed to invoke the granting of a new trial, but are more especially prompted because of what the decision of the jury has been on that contested point. There is no doubt but that the plaintiff, at the time of his injury, bore the relation of a passenger to the defendant, while on its car on the evening of the 25th of July, 1917, and that he was entitled to that degree of care from the defendant that is legally and usually exacted from a carrier to its passengers, unless, indeed, the plaintiff in this case has, by his own unwarranted act, taken upon himself the risks of a position on the car more hazardous than the one which the carrier had provided for him, and which was then reasonably available for his use. Whether the plaintiff had taken his place on the running-board as the result of the exercise of mere choice on his part, or from a necessity traceable to an overcrowded condition of the car, was the main fact dealt with in the evidence, and in the argument of the counsel to the jury, at the trial.

It is also true beyond doubt that while sustaining to each other that relation of carrier and passenger, his leg was broken by the occurrence of an accident which did not similarly affect other passengers who were then also occupying the running-board of the car. Outside of the volume of testimony relating to the crowded condition of the car, the determining factors of the testimony at the trial bore with special emphasis upon the conditions and circumstances that differentiated the plaintiff from the situation of other passengers on the running-board, and the things that specially affected him thereon, which were not then injuriously operative on these other running-board passengers. According

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to the plaintiff, he stood on the running-board, holding to the hand-hold at the end of either the sixth or seventh seat from the rear end on a large summer car operated by the defendant on that occasion. There were numerous other passengers on that running-board, both in front of him and behind him. According to one witness at least, there was room on the running-board in a space thereon corresponding in extent to the extent of space intervening between the seats inside, for three or four standing passengers, and the running-board was full on this occasion. The seats ran transversely across the body of the car, and there was not any center aisle inside the car through which to reach those seats. Passengers gained access to the seats, if at all, wholly from the running-board. The conductor, in collecting fares, transverses the length of the car, from seat to seat, by walking along outside, on the running-board, and he must, on that narrow footing, pass any passengers who may also be standing thereon. This work of the conductor is done while the car is running, and while he would be subject to the car's oscillations. When the open space between the seats is reached by him, the conductor, when going from the front of the car towards the rear—as was his mode of procedure on this occasion—reaching into that space between the seats to receive the fares from the hands of those passengers facing forward from the space in which he is operating. The seats are eight or ten feet long, and, by crowding a little, there is seating space enough for six passengers on each seat. When the conductor is engaged in this manner in collecting fares, in order for him to reach the passenger at the remote end of a seat from him, and receive his fare, the conductor is obliged to stretch his body inward of that space between the seats, and it is claimed by the plaintiff, that, while in this "crouching position," the conductor had proceeded in his work, in a manner negligent of any proper care to preserve his own equilibrium against the ordinary swaying of a running car, and through such lack of care, he had endangered, inexcusably, the safety of the plaintiff—a recognized passenger—who, owing to the crowded condition of the running board, on which he was compelled to stand, was then in a special and known peril of being jostled therefrom, by the unregulated and uncontrolled motions of the conductor, whether those motions were voluntary, or in-

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voluntary, and that, by reason of such carelessness, the conductor had actually bumped the feet of plaintiff off the running-board, and had thereby wrought his injury. The plaintiff stood on the running-board with his face toward the front end of the car, at the time, and the conductor then proceeded in his collecting of fares, with his face directed toward the rear. They thus faced each other, and then in that relative position, the conductor received from plaintiff's hand, his fare, and thereafter, proceeded to collect fares from the passengers sitting in the adjacent seat—thus turning his back toward the plaintiff, and extending his body into the open space between the seats... On page 5, the plaintiff testifies with respect to their respective positions at that time:

"He came up to where I was standing, he was standing right there (indicating;) I was standing about six or seven seats. He was about a seat or two from there. I reached my nickel in his hand; he reaches in this seat to collect fares. Q. He was reaching in to get fares between seats? A. Yes, sir. Q. Now where was that seat with reference to where you were standing? A. I was standing right here (indicating,) like this would be the seat; right here like this, (indicating,) from here, and he pushed in the seat to get fares and bumped against me with the swaying of the car. What position was he in when he bumped against you? A. A kind of a crouching position. Q. What caused him to bump against you? Was he holding to something, or was he not? A. No, sir. Q. And you say that, when the car gave a swing, he bumped into you? A. Yes, sir. Q. Just tell what happened to you? A. My foot went out, and I made a grab to catch myself, and he reared, and grabbed me, at the same time.

He pushes in right here, for to collect the fares, and the swing of the car bumped him into my legs, and knocked my foot from under me, and I made a grab this way, (indicating,) for to catch myself, and he reared back, and grabs me. Q. Weren't you holding to the car with your left hand before? A. Yes, sir. Q. And you grabbed with your right hand to get an additional hold? A. Yes, sir. Q. How far out did he kick your feet? I suppose about 20 to 24 inches. Q. From the running-board, or from the car? A. From the running-board. Q. How far was this post of this bridge

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from the running-board? A. About 15 inches. Q. And he knocked your foot out that distance? A. Yes, sir. Q. After your foot was knocked out that distance—or rather your lower parts—what happened? A. Broke my leg." &c., &c.

Under the version of facts thus given, if the jury gave it credence, there would be manifested a lack of vigilance on the part of the conductor, in performing his work of collecting fares to, at the same time, safeguard a passenger, entitled to a degree of care from him, which would be commensurate with the special peril of his then-situation, and whose foot-hold on the running-board of the car, the conductor well knew, would be easily disturbed, and, if disturbed, its disturbance would necessarily subject the plaintiff to danger of death or great physical injury. It is contended in behalf of the plaintiff, that, under this state of facts, there was legally due to him as a passenger from the defendant—not only all the protection from harm that is ordinarily due from a carrier to a passenger, but also a degree of care commensurate with the unusual danger to which the conductor knew him to be, at the time, exposed, by reason of his being obliged to be on the running board along with numerous other passengers. It is claimed that there was owing to him by the defendant safety from known dangers, and from preventative, tortious harm at the hands of other passengers, and also against harm from the negligence of defendant's agents, in affording him this legally-exacted degree of protection.

That, practically, the conductor, by reason of his being officially invested with the obligation of the carrier to protect its passengers from harm, was the defendant, and that a negligent discharge of this duty by him, was a negligent discharge thereof by the defendant itself. That there was due from the defendant to the plaintiff, not only a duty of protection against the wilful and wanton acts of its servants in the manner of their performing their duties, but also protection against their careless and negligent performance of those duties.

The conductor, on the other hand, without specially in his testimony directly contradicting most of the foregoing special details of how he and the plaintiff came into close proximity to each other at the instant of the happening of the accident, nevertheless, affirmatively states a situation widely

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variant from the statement given by the plaintiff, and alleges that he was, at the time, protecting himself and the passengers, by holding the hand-hold, and that he was located so that the body of the plaintiff was between him and the body of the car, and that, by reason of his position, he had prevented the plaintiff's entire body from being dragged off the car, and suffering greater injuries. The version given by the conductor, therefore, seeks to eliminate the appearance of there being any causal connection between any negligence on his part, and the occurrence of the accident. On this point, he gives his version, on page 54. He was there asked the following question: "Q. Now, will you describe, Mr. Dillinger, just the position of the plaintiff, and, as near as you can, tell us, how this accident happened? A. Well, his position was standing this way, (indicating,) he had hold of that handle—and I was coming this way—and I had hold with my right hand; I got this seat, and started in here, and he gave me his fare, and, as I went to step around him, he threw his leg around, and hit this pole, and of course, I grabbed around him, and held the other hand-hold, and held him, (indicating.) Q. Immediately after this accident happened, that is after his foot slipped off the running-board—what was your position on the running board, with respect to the plaintiff, what was your position with respect to him? A. That is when he hit the pole? Q. After he hit the pole? A. Well, you see, I grabbed around him this way, (indicating,) until we got the car stopped. Q. Was he between you and the body of the car? A. He was between me and the body of the car and the entrance into the seats." &c.

Of course, these two versions of the manner of the occurrence do not agree on vital points. The jury were obliged to determine the manner of the occurrence mainly from the conflicting testimony of these two witnesses—for, owing to the crowded condition of the car, and the brevity of the space of time within which the accident transpired, other witnesses were unable to see, and thereafter describe the precise manner of its occurrence.

As already stated, the main controversy at the trial, was with respect to whether it was practicable, in view of the large number of passengers, for the plaintiff to have avoided the dangers necessarily incident to his traveling on the run-

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ning board, instead of finding a place inside the car. There is no question about the rule of law that governs, when, without excuse, a passenger rides on the running board of a car. By such unnecessary act on his part, he takes on himself all the risks incident to such unconstrained position, and, in case of injury from such special and incidental dangers, he must himself bear the loss, and cannot legally compel the carrier to assist him.

"The running board of a summer car is not intended for the use of passengers, except as convenience in getting in and out of the car. A passenger who stands on the running board, when there is room inside, or when it is reasonably practicable to go inside the car, assumes the risk of his position." Burns v. Ry. Co., 213 Pa., 143.

Numerous other cases decide the same thing, and the proposition is not legally questionable. Had the case, at the trial, taken on that simple form, at the conclusion of the evidence, the Court, as a matter of law, should have directed a verdict for the defendant, as the defendant then requested. In any event, when a passenger is injured while occupying a place on the running board, in a suit for damages therefor, he has resting on him the burden of showing that the injury that then befell him was traceable to the negligence of the defendant—for, under those circumstances—the law will not of itself and without proof, presume that the injury was the result of defendant's negligence, as it would do, if, at the time it was received, the passenger had been within the body of the car, where passengers are, presumably, afforded a place of safety by a carrier.

But an injured passenger who, at the time, occupied the running board may, by evidence, show that, notwithstanding his presence there, he is still entitled to have his safety protected by the carrier—as other passengers are legally possessed of that same legal right—and he successfully lifts that special burden of proof resting on him to his injury having been received while he occupied the running board, when he shows by evidence that, owing to the crowded condition of the car, it was not reasonably practicable for him to find room inside the sar.

The plaintiff, recognizing his obligation in this respect, in presenting his case in chief, called many witnesses to sustain his contention that his presence on the running board

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was necessitated by the overcrowded condition of the car, and, notwithstanding the evidence later introduced by the defendant, the jury has found the fact to be as claimed by the plaintiff, and we think the weight of the evidence on that point was that way. The parties went to the mat on that issue, with the result above indicated.

With that point in plaintiff's favor, he stood free from imputed negligence, owing to his presence there, at the time of injury, and he, therefore, stood invested with a passenger's full right of protection there, and also of a degree of protection against injury commensurate with the special dangers incident to such a position, and not simply protection from only such dangers as a passenger within the body of the car might be liable to. Of course, the passenger had also exacted from him, by reason of his position on the running board, a degree of care for self protection commensurate with the special dangers incident to his position there.

In McCaw v. Union Traction Company, 205 Pa., 271, these questions received elaborate consideration and clear exposition: "Where a street railway company permits its cars to be overcrowded, additional care and precaution must be exercised by the conductor and motorman, to protect the passengers against resultant danger. A street railway company cannot invite, or permit, passengers to board its cars beyond their normal capacity, and not be responsible for danger which necessarily results from their crowded condition. If a passenger is permitted to enter a car having no vacant place except on the platform, and the conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so, and, by receiving him, the carrier undertakes and gives him assurance, that it will take care of him, and guard him against accident, as far as the circumstances permit."

In that case, the conductor, who had gone ahead of the street car, when it was about to cross a railroad track, and, after it had done so, and was about to descend a grade on the other side, jumped on the front steps of the platform of the car, on which the plaintiff and others were then standing, owing to the crowded condition of the car—but this act of the conductor in jumping on the platform, was on the side of the platform opposite that on which the plaintiff stood at the time, and, in doing so, he pushed, as was alleged, other

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passengers who were also on the platform, against the plaintiff, thereby causing him to lose his hold on the bar by which he was supporting himself, and fall under the wheel of the car. It was a disputed fact whether the conductor had jumped on the front end of the car at all, or not. It was held that the case was for the jury, and that the verdict in favor of the plaintiff should be sustained. One of the points that the lower court in that case had refused, and such refusal was, inter alia, made the basis of appeal to the Supreme Court, was this: "The only negligence alleged is that the conductor's act in mounting the west step, which nobody was on, resulted in pushing one of the eight persons on the platform (which it is uncontradicted will accommodate a larger number—and thereby pushing the plaintiff off the east side. This was not a natural or probable result of the conductor's lawful act, nor was his act the proximate cause of the accident, and the verdict should be for the defendant."

The refusal of this point was made in the appeal the second assignment of error, but it, with all the other assignments were overruled by the Supreme Court. The appellate court did not, as the assignment sought to have the court do, treat the act of the conductor as an isolated fact subsisting alone and disassociated from the obligation of the defendant to safeguard the passenger especially, and did not consider it when disassociated from the fact of the crowded condition of the car at the time, but treated the condition of the car as being concomitant with the conductor's act, and considered them in conjunction with each other, for the purpose of thus determining whether the carrier had, by neglect of duty, violated its obligation to the passenger in what the conductor did on that occasion. Justice Mestrezat delivering the opinion of the Court, on page 276, says: "Being a carrier of passengers, the defendant had a high degree of care imposed upon it. The company was required to exercise this care in receiving and in carrying the plaintiff to his destination. It has not yet been declared negligence for a street railway company to permit its cars to be overcrowded, but, when such a condition prevails, additional care and precaution must be exercised by the conductor and motorman, to protect the passengers against resultant danger. Beber v. Pittsburgh, etc. Traction Co., 179 Pa., 339. A street railway

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company cannot invite or permit, passengers to board its cars beyond their normal capacity, and not be responsible for danger which necessarily results from their overcrowded condition. If a passenger is permitted to enter a car having no vacant place except on the platforms, and the conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so; and, by receiving him, the carrier undertakes and gives him assurance that it will take care of him, and guard him against accident, as far as circumstances permit."

In the 8th volume of Thompson on Negligence, section 3578, the author, citing cases in other states, lays down substantially the same proposition as the foregoing case does, in these words: "As a general rule, a passenger who rides on the running board, when it is practicable for him to take a seat inside the car, assumes the risk of riding in this position. But he is not to be imputed with contributory negligence as a matter of law, where he rides on the running board of a crowded car. The question is one of fact for the jury. The passenger riding on the running board has the right to assume that the carrier will not expose him to peril, while so riding."

We are not to regard the pertinency of the question as to whether the car was so crowded as to oblige the plaintiff to take passage on the running board as having no other function to perform in the proper discharge of the case, than to show whether or not, the plaintiff, in being there, was free from contributory negligence, for that condition of the car and plaintiff's presence there also pertain to the solution of the question of whether the defendant, cognizant of the special peril to which the car's crowded condition had necessarily exposed him, in discharging its duty of protection to a passenger so circumstanced, has been faithfully or negligently performed. The fact pertains to the measure of defendant's duty, as well as to the measure of plaintiff's care of self protection. Being beset with greater perils in such a position, and the passenger by being there being adjudged to be free from contributory negligence, there is due to him in that position from the company a degree of watchful care proportioned to his enhanced peril there—and that defendant's agents do in discharge of that duty, is to be characterized as negligent or otherwise, in contemplation of those same circumstances.

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Did the conductor, in the manner of discharging his service of collecting fares for the company, perform that duty in such a manner as to, at the same time, properly discharge the company's duty to its passenger, in view of the special and known hazard of his then situation—that is the concrete question that is to be dealt with by the jury in this case. We are not to look at the conductor's movement at the time, as a single feature of the case, and as though it was an isolated fact, but must regard the whole concatention of attending facts and circumstances—for these, in their combined effect, make up the concrete question for solution.

In the case of Dennis vs. Railroad, 165 Pa., 624, there was evidence of a plaintiff's having been invited on a crowded car from which he could not extricate himself when he discovered its condition, by reason of others crowding in behind him and of the conductor's act in such a situation of pushing out a passenger whose ticket was for another car, and in doing so, he jostled the plaintiff in the case off the car, and thereby injured him. The case, under these circumstances, was held to be for the jury, and a recovery by the plaintiff, according to their finding, was sustained in the Supreme Court.

The occasion when the accident in this case happened, was not a special one that resulted in an unexpected number of passengers presenting themselves for transportation: The trip of the defendant's car was the usual one, and the making of the trip was designed almost exclusively for the accommodation of workmen who usually, at that hour, presented themselves to defendant for transportation, by a short run to Greensburg, where they lived. Huff Avenue, (at one end of the Kelly and Jones works), was the first place of receiving passengers on this inbound trip—and the Foundry—about 300 or 400 yards nearer Greensburg, (this being at the other end of the Kelly & Jones works,) was the next stop for receiving passengers. The plaintiff was the last man to gain a place on the crowded running board, at the last named stop, (so he testifies,) the car immediately started on its short run for Greensburg, and the accident occurred very soon thereafter. The crowded car was not an unusual and not-to-be expected occurrence, for it accommodated and was designed to accommodate, a crowd from the works that did not vary much in its size, and the plaintiff was but

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one of those for whose accommodation the trip of that car was particularly designed.

In support of the motion for a new trial, it is claimed that the plaintiff's evidence shows the ordinary lurching of the car to have been the proximate cause of the accident, and, for that, there can be no recovery. We do not understand that to be the ground upon which the plaintiff's testimony seeks to show a case for recovery. It is true the swaying of the car is mentioned in connection with an allegation of the unguarded movements of the conductor's body, which displaced plaintiff's feet, but it is so mentioned, therewith to show that such usual swaying of the car was one that the conductor should, but did not, exercise reasonable care to guard himself against, and that, therefore, he was unmindful of how the passenger's safety might be affected by his own contact with him, when, with proper care, he could have prevented contact, and the harmful consequences therefrom resulting. It is true that if the usual lurching of the car was, in and of itself, the alleged basis of recovery, the verdict could not be sustained, for nothing extraordinary in that respect is shown.

The case of Wolf v. Transit Company, 252 Pa., 448, is cited to sustain the proposition, that, "Where the facts are simple, and the evidence by which they are presented is involved in no uncertainty, their legal value is for the court to determine, but where the evidence is conflicting, or the facts are left in doubt, the conclusions are to be drawn by the jury."

The proposition, as stated in that case, is undoubtedly true, but that its proper application in this case required the Court to direct a verdict for the defendant—rather than to allow the jury to draw the proper conclusions, we do not agree.

On the question of whether there was a necessity for plaintiff's taking a place on the running board, the case was bound to go to the jury in any event, and all subsidiary questions would be carried there along with it, and must be passed on by the jury, rather than by the Court.

Whether the conductor, under all the evidence, had discharged the carrier's duty of care to a recognized passenger, was a question that properly devolved upon the jury. That

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tribunal having determined the question in plaintiff's favor, the first reason for a new trial is overruled.

We, however, think that the second reason for a new trial, wherein it is alleged that the verdict is excessive in amount, is well founded. The plaintiff's leg which was injured was a diseased and unnatural member, from his boyhood. The plaintiff always was required to use a cane on account of it. He wore a padded shoe on that foot, to obtain an equalization of length in his legs. The leg injured had not developed from what it had been when he was a boy of ten years of age. The knee was a sort of hinge that was liable to be bent either backward or forward. He, before the accident, had suffered pain in it, and had required, on account of its condition, the services of a physician. His earning power, when working, was only $65.00 per month. The expenses to which he had been subjected on account of this accident, were not large. His incapacity to work, by reason of the accident, covered a period of several months however. He does not now have an uncrippled leg—and he did not have one at the time of the accident. We, therefore, think that the jury have awarded a pecuniary recompense from the defendant greater in amount than it should have done, in view of the evidence, and in view of the extent of plaintiff's physical recovery from the consequences of the accident.

And now, 16th April, 1920, upon due consideration of the motion and reasons for a new trial, it is ordered that, if the plaintiff, within ten days from the filing of this order, shall file a remittur from the amount of the verdict of $2,288.20 of all thereof in excess of $1,500.00, a new trial is refused, and judgment may be entered in favor of the plaintiff for the sum last named, and costs, but if such remittur by the plaintiff within the time herein prescribed is not filed, a new trial is granted.

The motion for judgment N. O. V. in favor of defendant on the whole record, is refused.

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ANTONACCI VS. COMMONWEALTH

Summary convictions.—Certiorari.—Essentials of a Record.

The record of a Justice of the Peace to sustain a judgment in a case of summary conviction must show that a warrant was issued or that the defendant was arrested on view; that the defendant appeared before the Justice; that the prosecutor and witnesses for the Commonwealth were sworn or that testimony was offered and the nature and character of the evidence; the names of the witnesses who were called and testified the sum or substance of their testimony and that the defendant was adjudged guilty and of what crime or offense he was found guilty.

In the Court of Common Pleas of Westmoreland County, Pa., No. 442 Feb. Term, 1920. Certiorari.

Richard D. Laird and Charles H. Moore, for plaintiff in error.

No appearance for defendant in error.

COPELAND, J.: This action had its origin on the 19th day of December, 1919, before W. W. Davis, a Justice of the Peace, in and for the County of Westmoreland, against the plaintiff in error. The plaintiff, an alleged unnaturalized resident, had a dog in his possession, and the justice fined him $25.00 and costs amounting to $8.70. The record of the justice was certioraried to the Court of Common Pleas, and the matter is now before us.

On an examination of the record of the justice, certified by him as a true transcrip from his docket and attached to the petition of the plaintiff in error for an allocatur, we find that the record does not show:

First: That a warrant was issued or that the defendant was arrested on view. This is essential in a summary proceeding. It was said in Carter vs. Shindel, 7 D. R. 308: "The record of a magistrate, like the record of a higher court, must show upon its face, everything necessary to sustain the judgment."

Second: That the defendant was brought before a magistrate. This is essential to the validity of a judgment in a case of this character. In Philadelphia vs. Roney, 2 Philadelphia Reports 43, it was said: "The record must show that the defendant appeared before the alderman."

Third: That the prosecutor and the witnesses for the commonwealth were sworn, or that testimony was offered, or the nature and character of the evidence. In Commonwealth to use vs. John Finkheimer, 9 Philadelphia Reports, 504, it was said: "The record must show that there was some evidence of the acts constituting the offence." In Clark

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vs. Barlett, 8 Philadelphia Reports, 301, it was said: "The record should show that all the proceedings conformed to the law; that the charge is sustained by the testimony of duly qualified witnesses, or by the confession of the defendant; and that judgment was duly entered."

Fourth: The names of witnesses, or that witnesses were called and testified, the sum or substance of their testimony, or the evidence offered on behalf of the commonwealth, or that the defendant was adjudged guilty, or of what crime or offense he was found guilty. In Commonwealth vs. Nesbit, 34 Pa., 403, it was said: "It is still essential, that a summary conviction shall contain a finding that a special act has been performed by the defendant; and that it shall describe or define it, in such a way, as to individuate it, and show that it falls within an unlawful class of acts. Without this, a judgment that the law has been violated, goes for nothing." In Laverty et al. vs. Commonwealth, 4 Pa. C. C. 139, it was said: "Record of a summary conviction should contain an information or charge against the defendant; a summons or notice of the information, in order that he may appear and make his defense, or a warrant showing his arrest; his appearance or non appearance; his confession or defense; the evidence, if he does not confess, and the judgment or adjudication. All these matters must be particularly stated. The whole evidence, which applies to the charge must be particularly set out in the record."

The record does not show that anybody instituted this proceeding or what Act of Assembly is violated. These omissions, as we have stated, are all fatal to a summary proceeding.

AND NOW, to wit: the 3rd day of May, 1920, after argument and after due consideration, it is ordered, adjudged and decreed that the judgment of the justice be, and hereby is, reversed.

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CRESCENT BREWING COMPANY VS. ROSSITER ET AL.

Judgments—Sci Fa. to revive judgment naming terre tenants. Defense by terre tenants that judgment never was a lien on part of land and divested as to the balance. Right of terre tenants to defend in such proceeding. Merger of mortgage lien with an estate in land.

At the trial of an action of scl. fa. sur judgment and verdict in the writ defended on the grounds that they were not terre tenants of any real estate upon which plaintiff's judgment was a lien, because (1), after a proper Sheriff's sale of the only real estate upon which the plaintiff's judgment ever had been a lien and because of the said sale having been effected in execution of a mortgage lien prior in date to the lien of the plaintiff's judgment, the latter was necessarily thereby divested therefrom and that the title thus acquired by the purchaser who was named as terre tenant in this proceeding thenceforth stood free and clear of any further obligation or claim by plaintiff on its judgment and that neither the said purchaser, nor the other parties defending could be named as terre tenants of any real estate upon which plaintiff ever had before that sale acquired of land, and

(2.) That as to real estate which had never been subject to the lien of the mortgage or plaintiff's judgment and which was owned by defendants, the defendants could not be adjudged the terre tenants thereof with an adjudication de terris against them.

Plaintiff filed a motion for judgment n. o. v., alleging:

(1.) That as the defendant's relation to the case was that of terre tenants, their defense may not be set up as a defense to the scl. fa. proceeding to revive the judgment, but that they must await the sale of their land on the revived judgment and then introduce their defense against the title obtained by the purchaser at that sale, and

(2.) The question was suggested, did the plaintiff in the proceeding on the mortgage lien (which resulted in the Sheriff's sale) merge any of his title to the real estate subject to that lien and thus prevent a divesture of the plaintiff's junior lien, he having been the pur chaser at the Sheriff's sale?

It was held, first as to the suggestion of merger, that the case disclosed no intention that there should be a merger, merger always being a matter of intention; that it would not have been to the advantage of the purchaser at the Sheriff's sale, who was the plaintiff in the writ, that there should be a merger; that the Sheriff's sale committed no legal wrong against the rights of the plaintiff in this proceeding and that no merger of the selling incumbrance in any estate which the plaintiff held in that land took place, and that

(3.) It is open to one named as a terre tenant to show that his lands are not answerable for the payment of a judgment whose lien thereon has been legally divested and that he is entitled to have judgment in his favor on a writ of scl. fa. wherein a judgment de terris is sought by the plaintiff to be recovered against him despite the fact that plaintiff's original judgment has been legally divested of the right to do the thing it is attempting to do.

In the Court of Common Pleas of Westmoreland County, No. 280 May Term, 1919. Sci. Fa. Sur judgment No. 458 May Term, 1914. Defense and issue, as to amount tried, and verdict in their favor. Plaintiff moved the Court for judgment n. o. v. on the whole record.

Moorhead & Smith, for plaintiff.

Gaither & Whitten, for defendants.

McConnell, P. J.: The pending motion for judgment N. O. V. on the whole record, is based on two legal propositions, viz:

(1.) The defendants' relation to the case being that of terre tenants, they are not entitled to set up the defense introduced by them at the trial as a defense to a writ of Sci. Fa. to revive a judgment against the debtors, but, to avail

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themselves of it, they must await a sale of their land on the revived judgment, and then introduce this kind of a defense against the title thus obtained by the purchaser at that sale.

(2.) Plaintiff suggests, in the second place, the question: Did the lien of a Ritter judgment against James M. McLaughlin, on its being assigned to Guy Rossiter on May 7th, 1918, merge in any title or estate which Frederick Rossiter had in the land, and thus prevent later a divestiture of the title of James M. McLaughlin by a Sheriff's sale of the property on said judgment, upon which plaintiff at the time of the sale was also a junior lien creditor of James M. McLaughlin, and Frederick Rossiter having been the purchaser at the sale?

The Court is of opinion, under the facts appearing in the case, that both those questions must be determined adversely to the plaintiff, and, therefore, that plaintiff's motion for judgment N. O. V. on the whole record, should be refused. The reasons for these conclusions are as follows:

The main facts in the case are not in any substantial dispute; at least the facts appearing in the evidence are such, as to make it improper for the Court to enter the judgment now sought.

On, and prior to January 10th, 1913, Mary J. McLaughlin was the owner of two contiguous tracts of land, situate in Lower Burrell Township, one containing 230.598 acres; the other containing 8.593 acres; she was also then the owner of two certain lots situate in the Borough of Parnassus. The plaintiff herein never was her creditor, and never held any lien on any real estate while she owned it. On the 10th day of January, 1913, Mary J. McLaughlin conveyed to James M. McLaughlin a portion of the two above-mentioned contiguous tracts, that is to say, she conveyed to the purchaser 110 acres and 50 perches thereof, a description whereof is fully set out in the deed of conveyance. This deed was placed on record in Westmoreland County in Deed Book 523, page 498, on the 11th day of January, 1913, that is to say, on the next day after its date. Later, to wit: on the 18th day of October, 1913, James M. McLaughlin, the grantee, gave to one P. J. Ritter, a mortgage on the aforesaid 110 acres and 50 perches in the sum of $3,500.00. This mortgage was entered of record in Mortgage Book 268, page 439, on October 22nd, 1913. This mortgage, when given, was accompanied

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by a judgment bond to further secure payment of the mortgage-debt. The bond was entered of record as a judgment on the 12th of April, 1918, and by a Fi. Fa. issued from the judgment so entered on this bond, the title of the mortgaged premises was later sold at a Sheriff's sale for non-payment of the mortgage debt, and was purchased by Frederick Rossiter, one of the defendants herein.

The Crescent Brewing Company, the present plaintiff, was not and never had been a judgment creditor of Mary J. McLaughlin, and held no lien on any of her real estate while she was owner of the legal title thereto.

On the 20th of March, 1914, at No. 458 May Term, 1914, the Brewing Company obtained a judgment against the aforesaid James M. McLaughlin and one John B. Whitesell, in the sum of $4,500.00. At this time, James M. McLaughlin was still the owner of the 110 acres and 50 perches, but of no other real estate. This is the judgment which, in this action, is sought to be revived by the present Sci. Fa., with notice to the above named terre tenants.

On July 12th, 1916, James M. McLaughlin—(being still the owner of the 110 acres and 50 perches, and of no other real estate,)—joined with the aforesaid Mary J. McLaughlin—(who was then the sole owner of the balance of her real estate which remained in her hands at the time she had conveyed the 110 acres and 50 perches to James M. McLaughlin)—in making a joint conveyance to Frederick Rossiter, Hattie Crawford, William Crawford and Annie Rossiter, describing the subject-matter of that conveyance in its entirety, and embracing in its terms of description, all the real estate that Mary J. McLaughlin had before had an exclusive title to, prior to the time of her making the conveyance of the 110 acres and 50 perches thereof, to James M. McLaughlin. The reason for thus describing the property to be conveyed by a joint deed in its entirety,—(as the scrivner of the deed testified)—without individuating in the deed through any recital of the respective portions thereof, which were then owned by the two grantors by separate title of each without recital therein, that no portion thereof was then, or ever had been, owned jointly by the two grantors,—was this: that the writer of the deed, who resided in Pittsburgh and where the records of title were inaccessible to him, but that he had a full description of the Mary J. Mc-

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Laughlin property in its entirety, but he did not, at that time, have accessible to him any proper description of the portion thereof that had theretofore been carved out of the original tract, by the previous deed of Mary J. McLaughlin to James M. McLaughlin. It was considered by the scrivner that, if a deed was then made that purported to convey the entire tract, and that deed was joined in by all the grantors who then had any separate interest in any part thereof, the deed would be efficacious for completely vesting in the grantees the entire title, and that was the thing sought to be accomplished. At the time of this joint conveyance, viz: July 12th, 1916, by Mary J. McLaughlin and James M. McLaughlin to Frederick Rossiter, et al., there existed as encumbrances on the title to the 110 acres and 50 perches then owned individually by James M. McLaughlin, (1) the lien of the Ritter mortgage of $3,500.00, and (the judgment on the accompanying bond was not entered until 12th April, 1918;) (2) the lien of plaintiff's judgment for $4,500.00; but these were not,—and never had been,—encumbrances against any title to any real estate which Mary J. McLaughlin personally then owned, and never had been liens against James M. McLaughlin, until after he had taken title to the 110 acres and 50 perches. The property embraced in the joint deed made by Mary J. McLaughlin and James M. McLaughlin to Frederick Rossiter et al, was, (a) the abovementioned tract containing 230.598 acres; (b), the tract containing 8.593 acres, and (c), the two lots, 7 and 8, situate in the borough of Parnassus.

The fact was not contested at the trial that the James M. McLaughlin tract of 110 acres and 50 perches was wholly embraced within the boundaries, as given in the deed, of the original 230.058 acres, when owned by Mary J. McLaughlin. In reference to the title made by deed made jointly by Mary J. McLaughlin and James M. McLaughlin, dated July 12th, 1916, to Frederick Rossiter, Hattie Crawford, William Crawford, and Annie Rossiter,—the grantees therein named made a declaration of trust, in brief, to this effect: "The" (the grantees), "hold the legal title to said real estate, NOT FOR OURSELVES, BUT IN TRUST * * * to the end, that the said real estate may be conserved, and the proceeds secured for the said Mary McLaughlin."

This declaration of trust—according to the date given in

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the instrument—was made July 21st, 1916, nine days after the date of the deed to them by Mary J. McLaughlin and James M. McLaughlin, but reciting in the declaration that it was of even date therewith and was intended to so operate.

On April 12th, 1918, Magdalena Ritter, Executrix of the aforesaid mortgagee, (who was then dead), entered, as the representative of decedent's estate, judgment for $3,936.98 against James M. McLaughlin, et al, on the judgment bond which had accompanied the aforesaid mortgage of James M. McLaughlin, et al, to P. J. Ritter, dated October 18, 1913. This judgment was entered at No. 517 May Term, 1918; and, on the same day, the plaintiff therein caused execution to be issued at No. 75 May Term, 1918, whereby the Sheriff,—after due notice,—seized in execution, and, on May 19th, 1918, sold the said tract of 110 acres and 50 perches to Frederick Rossiter.

In pursuance of the sale so made, the Sheriff made a deed to Frederick Rossiter, and acknowledged the same, which deed bears date May 15th, 1918, and is recorded in Deed Book 542, page 12. This deed purports to convey to Frederick Rossiter the said tract of 110 acres 50 perches, as being formerly the property of James M. McLaughlin, and being the same premises as were described in the said mortgage made by James M. McLaughlin to P. J. Ritter, and being all the lands then claimed to be owned by the said James M. McLaughlin. He had, in fact, before that time, joined with Mary J. McLaughlin in the conveyance to the defendants, but his portion of what was so conveyed, was subject to the lien of the Ritter mortgage, and the Sheriff's sale on the accompanying bond was designed to enforce payment of the mortgage debt, to which the title of the defendants herein in the 110 acres and 50 perches was then subject. Prior to that Sheriff's sale, the property had, of course, been also subject to the lien of plaintiff's judgment, but, unless the sale can now be adjudged a nullity, it effected a discharge of plaintiff's lien, from the property so sold.

It is, therefore, now claimed by the defendants herein, the alleged terre tenants, that, after this Sheriff's sale of the only real estate upon which the plaintiff's judgment had ever been a lien,—and because of the said sale's having been effected in execution of a mortgage lien prior in date to the

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lien thereon of plaintiff's judgment at No. 458 May Term, 1914,—the latter lien was necessarily thereby divested therefrom, and that the title thus acquired by Frederick Rossiter, thenceforth, stood entirely free and clear of any further obligation or claim by plaintiffs on their judgment, and that neither Frederick Rossiter nor any of the other parties defending in this issue could be terre tenants of any real estate upon which plaintiff had ever before that sale acquired a lien; it is also claimed that, with respect to the real estate upon which plaintiff had ever before that sale acquired a lien; it is also claimed that, with respect to the real estate which Mary J. McLaughlin had never conveyed to James M. McLaughlin, and which had never become subject to the lien of either the mortgage or plaintiff's judgment, against James M. McLaughlin, the defendants being now the owners of said land, could not be herein adjudged to be terre tenants thereof, and could not in their hands be answerable for the payment of any part of the judgment which plaintiff seeks to have revived, with an adjudication de terris against them, the alleged terre tenants. That, therefore, defendants are not, and, at the time of issuing the Sci. Fa. in this case, were not, terre tenants of any real estate upon which plaintiff's judgment was a lien. It is the claim of a lack of right in defendants to show this state of facts, as a defense to the revival of plaintiff's judgment, the basis of the first ground of reliance in support of the motion for judgment N. O. V. on the whole record.

The plaintiff, however, in further support of its motion, seeks to nullify the otherwise apparently legal effect of the judicial sale made May 10th, 1918 to Frederick Rossiter, by showing that the Ritter judgment, where through the Sheriff's sale was effected, was assigned to one, Guy Rossiter. It was, however, asserted in evidence, to which assertion there was no contradiction in the evidence, that this same Guy Rossiter, who lived in Chicago, had in fact, furnished the principal part of the consideration money for the purchase of that assignment of the judgment upon which the selling writ had been issued,—and only an inconsiderable part thereof was paid personally by Frederick Rossiter—and that, for affording a secuity to Guy Rossiter; for the loan made to him, it was desired to keep that judgment on foot. The assignment was not filed of record before the sale,

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and was made after the Ritter execution had been issued and levy made upon the property, and three days thereafter the judicial sale took place, the writ being then under the control and direction of Guy Rossiter's attorney. At the sale Frederick Rossiter purchased the property for $100.00. The property, at a duly advertised sale by the Sheriff, was not bid up to cover the plaintiff's lien, which was an encumbrance on the property subsequent to the mortgage lien, and the proceeds of the sale,—in so far as they went,—were devoted to payment of what was superior in legal right to the lien of plaintiff's judgment.

The plaintiff offered the declaration of trust, for the purpose of showing that there was a merger of the right of Frederick Rossiter as a judgment creditor in his title to the mortgaged land, and that, therefore, there was no proper sheriff's sale made, and that, therefore, no title passed by virtue of the Sheriff's sale. That was based on the assumption that Frederick Rossiter had become the holder of the judgment, which was contrary to the proven fact.

This contention, of course, only pertains to the James M. McLaughlin tract of 110 acres and 50 perches, which is differentiated adequately from the Mary J. McLaughlin property, and the James M. McLaughlin property, alone, was sold at Sheriff's sale, and upon it, alone, the plaintiff had a lien. After James M. McLaughlin had mortgaged that tract to P. J. Ritter, he still remained the owner of the equity of redemption therein which equity, he could, and did, convey, later, to the defendants herein, who held it along with other property, as trustees for Mary J. McLaughlin, who thereby became the beneficial owner, and remained so, until the Sheriff's sale to Frederick Rossiter. We need not stop now to consider in this case, whether in becoming a purchaser at the Sheriff's sale, there was any legal duty incumbent on Frederick Rossiter, with respect to the title so acquired, to his fellow-trustees, or to their cestui que trust, Mary J. McLaughlin; for, if there was, the plaintiff has no concern in that, and if there was not, the fact is immaterial in the case. The thing plaintiff asserts herein is that the sale was a nullity, because there was a merger of the judgment in the title,—Fred Rossiter and three others having had conveyed to them as trustees for Mary J. McLaughlin the equity of redemption in the mortgaged property. But merger was

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plainly a thing not intended, and it was not intended for a perfectly legitimate reason, which was violative of no legal right of the plaintiff as a junior lien creditor of James M. McLaughlin.

Even if,—contrary to what sufficiently well appears to the contrary,—we assume, for the present, that Frederick Rossiter, at the time of the Sheriff's sale, was the owner of the mortgage obligation, where through the sale was effected, it does not necessarily result that there is a merger of the encumbrance in the title.

"A mortgage does not necessarily merge, or become extinct, by being united in the same person with the fee. When a person becomes entitled to an estate subject to a charge,—for his own benefit, he may take the estate, and keep up the charge. The question in such case is upon the intention,—actual or presumed,—of the persons in whim the estates are united." Bryar's Appeal, 111 Pa., 81. Moore v. Harrisburg Bank, 8 Watts, 138. Fenton vs. Fenton, 208 Pa. 358.

"As a general rule, merger is a question of intent, and will not take place against the wishes of the party to be affected by it; and where it is against the interest of the person holding the respective titles, the law will not presume an intent to merge." Danhouse's Estate, 130 Pa. 260.

"A mortgage lien purchased by the owner of the equity of redemption will not merge in the absence of a manifest intention to the contrary, but will be kept alive in equity, where that course is necessary to protect the purchaser against a junior mortgage, or other intervening lien or claim.

If the purchaser of an equity of redemption has assumed the payment of the mortgage-debt, or otherwise made himself personally liable for it, his payment of the amount of such debt will be held to work an extinguishment of the mortgage, and he cannot take an assignment of it to himself. On the other hand, if he has not assumed the mortgage, or agreed to pay it,—the prior obligation therefore still resting on the mortgagor,—the purchaser may discharge the encumbrance, to prevent a sale, or to perfect his own title, and, thereupon, take an assignment of the mortgage, or be subrogated to the rights of the mortgage." 27 Cyc. 1331.

There is not the slightest evidence that Frederick Rossiter ever personally assumed the mortgage-debt. It re-

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mained the debt of the mortgagor, and a sale of the property was made on his personal obligation. He, Rossiter, would have the perfect legal right to purchase the mortgage, keep it on foot, and execute it against the property, with a view to a divesting therefrom the encumbrance of plaintiff's judgment, and with a view also to his becoming a purchaser at such divesting sale. The plaintiff, however, could as readily have become the purchaser as Frederick Rossiter.

In Bryar's Appeal, supra, a purchaser of land from an assignee in bankruptcy, subject to a mortgage given by the bankrupt, received title only to the bankrupt's equity of redemption. He afterwards purchased the mortgage, and again sold the land under a judgment recovered on the mortgage, and he, himself, at such sale, again became the purchaser, and it was held by the Supreme Court, that the incipient right of dower in the bankrupt's wife, which had in nowise been affected by her husband's bankruptcy, was thereby effectually divested.

It is plain by the facts of this case that there was no intention that there should be any merger; it is plain that it would not have been to the advantage of Frederick Rossiter that there should have been a merger; and it is plain that when the Sheriff's sale of the mortgaged premises was effected—even if it was intended thereby to divest the lien of plaintiff's judgment, as well as the mortgage, as encumbrances on the mortgaged property—that no legal wrong was thereby committed against the rights of the plaintiff, who was a junior encumbrancer to the mortgage creditor. Our cases on the subject of merger are exhaustively reviewed by Judge Head, who delivered the opinion of the Court, in the case of Pease v. Doane, 33 Sup., 6. It, along with the other authorities above cited, inevitably leads to the conclusion that there was no merger of the selling incumbrance in any estate held by Frederick Rossiter in the land—even assuming that he, instead of Guy Rossiter, at the time of the sale, owned the selling incumbrance. It is all the clearer, however, that this is true, when the selling incumbrance was held by Guy Rossiter.

The other question is: Can the defendants in an action by Sci. Fa. to revive and continue the lien of a judgment, with notice to them as terre-tenants, defend against plaintiff's claim that they are terre tenants on the ground that

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they are not tenants of any real estate upon which plaintiff's judgment is a lien and which plaintiff may lawfully take in execution for the satisfaction of his judgment, if he should recover one—; or are they precluded from making such a defense to the Sci. Fa., and can they only legally make their defense available against some one, who, through a Sheriff's sale effected through a judgment recovered on the Sci. Fa. has taken title to the land with respect to which the plaintiff's Sci. Fa., and the judgment thereon, have made it appear, prima facie, that the land may be lawfully taken to satisfy the judgment? When the plaintiff issued his Sci. Fa. in the form employed herein, it thereby declared that the defendants were terre-tenants, and that it was entitled to have a judgment against them, de terris, which will authorize it, for the satisfaction of its judgment thereafter, to sell their lands. They are not plaintiff's debtors, and if liability to be answerable for plaintiff's judgment exists, it is a liability that attaches to their property only through the lien of plaintiff's judgment thereon, and that is the avowed basis of plaintiff's claim, as expressed by the Sci. Fa. in the form herein employed. Why should not defendants be herein allowed to deny that kind of liability the plaintiff herein asserts to exist? The whimsicality of the law, as expressed in some early decision in this State, made the giving of a proper answer to this question somewhat subject to doubt, but later decisions have caused the sunlight to break through the clouds, and now, when a holder of a judgment in a Sci. Fa. asserts that lands held by some one other than the defendant in the judgment are liable to be appropriated for the payment of that judgment, and he therein seeks to get through the Sci. Fa. a form of judgment that will apparently judicially appropriate such lands to such payment,—such an owner (subject to limitations), is permitted to negative what the plaintiff by his Sci. Fa. asserts, by showing the legal non-liability of his lands to such an appropriation. In the case of Colwell vs. Easley, 83 Pa., 31, it was decided that "in proceedings on a scire facias to revive a judgment, where one is brought into court who has had no connection with debtor's title, he should be discharged—either by non suit, or a verdict in his favor." It was specifically decided in that case, that:

"In a scire facias to revive the lien of a judgment C., who

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was summoned as a terre tenant, pleaded that the original judgment was not a lien on his lands, and never had been. Held, (reversing the Court below), that this was a good plea, and that striking off such a plea was erroneous."

The Act of 4 April, 1798, (3 Sm. L. Secs. 2 and 3), which deals with the subject of the lien of judgments upon real estate and their revival, provides that writs of scire facias to revive "shall be served on the terre-tenants or persons occupying the real estate bound by the judgment."

Was defendant's lands bound by the lien of plaintiff's judgment at the time of the service of the Sci. Fa."

In the case of Hulett et al v. Insurance Co., 114 Pa., at page 146, this definition of what is meant, in this connection, by a terre tenant, is given: "A terre-tenant, in a general sense, is one who is seized or actually possessed of lands as the owner thereof. In a scire facias sur mortgage or judgment, a terre-tenant is, in a more restricted sense, one other than the debtor, who becomes seized or possessed of the debtor's lands subject to the lien thereof. Those only are terre-tenants, therefore, in a technical sense, whose title is subsequent to the encumbrance."

In the latest case dealing with the subject, B. & L. Association v. Elleford, 258 Pa., 143, the foregoing definition is quoted with approval, and it was there held that "where a person derived his title eleven weeks prior to the date of the original judgment, he was not a terre-tenant, within the meaning of the Act of 1798, and a judgment of revival entered against him by default was properly stricken from the record."

In this case the mortgage by James M. McLaughlin to P. J. Ritter was given on the 18th of October, 1913, and only embraced the 110 acres and 50 perches, that he then owned. What Mary J. McLaughlin had still retained when she conveyed that 110 acres andn 50 perches tract to James M. McLaughlin, and was still remaining in her hands, at the time James M. gave the mortgage to Ritter, was wholly unaffected by that mortgage. When she, on the 12th of July, 1916, joined with James M. McLaughlin, for the purpose of conveying to defendants what they each as grantors then respectively owned, what she owned was still free from the encumbrance of that mortgage. Prior to that date, to wit: on the 20th of March, 1914, the Crescent Brewing Company,

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the plaintiff therein, had entered an original judgment for $4,500.00 against John B. Whitesell and James M. McLaughlin. This judgment became a lien on the 110 acres and 50 perches, then owned by James M. McLaughlin, but its entry left entirely unaffected the 128 acres than owned by Mary J. McLaughlin. It is plain, therefore, that this latter tract, when it was conveyed to the defendant, vested in them untrammeled by an lien of plaintiff's judgment—and, as to it, the defendants never became terre-tenants of land upon which plainti's judgment was ever a lien.

It was a judgment of that kind by default that was held to have been properly stricken off as a nullity, in the case of B. & L. Assn. v. Elleford, 258 Pa., 143.

How about defendants being terre-tenants of the James M. McLaughlin tract of 110 acres and 50 perches? What defense with respect thereto can they make to the Sci. Fa? Are they herein liable to have a judgment de terris entered against them with respect to that tract? The conveyance to them was made on the 12th of July, 1916. The plaintiffs judgment against James M. McLaughlin, the grantor, was entered on the 20th of March, 1914... Before the entry of that judgment, to wit: on the 10th of January, 1913, Mary J. McLaughlin had conveyed this last mentioned tract to James M. McLaughlin, and he was still the owner, at the time of the conveyance by him to defendants. At that time, too, plaintiff's judgment was a lien on the land conveyed to defendants. Therefore, the defendants, at the time of their purchase, became terre-tenants of this land. The lien of plaintiff's judgment, however, was subsequent to the lien of the Ritter mortgage, and through the bond accompanying it, that prior lien was executed against the land, and the lien of the plaintiff's judgment thereon was thus divested—as we have concluded above. It is immaterial in this case, whether the purchaser at that divesting sale, purchased for himself individually, or whether he purchased as one of the four trustees, and for the purpose of the trust, as set out in the declaration of trust. The pregnant fact is that plaintiff's lien was legally divested by the judicial sale of this property, and the plaintiff cannot now restore the status of affairs as they were before the Sheriff's sale, by resort to a writ of Sci. Fa., embracing these defendants, or any of them, as terre-tenants of the same land from which its lien had been pre-

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viously divested. The defendants, having purchased the property while it was subject to plaintiff's lien, could, on that account be properly designated as terre-tenants in the Sci. Fa., but when the plaintiff, despite the previous legal divestiture of its lien by judicial sale effected through execution based on a senior lien, seeks to thereafter continue the efficacy of that same lien against the same property from which it had already been divested—may not the defendants set up those facts of previous divestiture, as a defense against a proceeding conducted for the very purpose of getting a judgment de terris against them? One who is a terre-tenant can set up defenses to a Sci. Fa. that one who has been named as such, but not properly so named, may not do.

"On a scire facias to revive and continue the lien of a judgment on real estate, no one but he who is a terre-tenant can plead that the land is discharged from the lien of the original judgment." Silverbloom v. Townsend, 37 Pa. 263.

1 Trickett on Liens, sec. 229, collects some of the cases in which defenses open to terre-tenants are exemplified: "The terre-tenant may show a discharge of the lien which once bound his land, by payment, release, or afflux of time, (Dengler v Kiehner 13 Pa. 38), as well as that the lien had ceased before he became the purchaser, (Coldwell v Eastley, 83 Pa. 31), and also that the judgment of revival on which the Sci. Fa. issued was confessed on the condition that its lien should be restricted to land other than that owned by the terre-tenant. (Sankey v. Reed, 12 Pa., 95). He may show that land of the defendant sufficient to discharge the debt has been released by the plaintiff, after notice of the terre-tenant's purpose, and of the injury he would undergo by the release."

In the case of Frost v. Holmes, 11 W. N., 443, there had been a foreign attachment, improperly issued against a resident of the State, and the defendant therein had confessed judgment in that improper proceeding. The property so attached was a house and lot—and the Sheriff had made that return to the writ. Pending the proceedings, January 28th, 1873, John Holmes purchased the house and lot, which had been attached, from defendant in the foreign attachment. This deed was not placed on record, and, later, to wit, on July 30, 1874, the defendant confessed the judgment in the foreign attachment. The defendant confessed the judgment

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in the foreign attachment. The defendant was not a non-resident. The plaintiff in the confessed judgment in the attachment, sought to revive this confessed judgment by Sci. Fa., with notice to Holmes as terre-tenant. Holmes put in the plea: "No lands bound by the lien of said judgment." Held, that the attachment being unlawfully issued, had originally constituted no lien against the land, that the confession of judgment by the defendant after the sale to the terre-tenant, could not avail to create one, and that it was competent for the terre-tenant to set up this defense, and that he was accordingly entitled to judgment. Justice Green, delivering the opinion of the Court, inter alia, said: "A Sci. Fa. having issued at the suit of the plaintiff in the foreign attachment, to revive this subsequently confessed judgment against the purchaser as terre-tenant, it was undoubtedly his right to show, in this proceeding, that the judgment was a lien upon his land. To concede that he took his title free of the lien of the judgment, and yet deny him the right to assert it in this proceeding, would be a mockery of justice."

We are of opinion that it is open to a terre-tenant to show that his lands are not answerable for the payment of a judgment whose lien thereon has been legally divested and that, he is entitled to have judgment in his favor, in a writ of Sci. Fa. wherein a judgment de terris is sought by a plaintiff to be recovered against him, despite the fact that plaintiffs original judgment has been legally divested of the right to do the thing it is attempting to do.

Nor can it be successfully asserted in this case that the title acquired—conceding the sale by the Sheriff as not a nullity—would, notwithstanding the sale, continue subject to plaintiff's lien.

"A purchaser at a Sheriff's sale which divests the lien of judgments, is not a terre-tenant as to them; but if the purchaser agrees to buy, subject to the lien of any of them, he is properly warned as a terre-tenant in the proceeding to revive such." Trickett on Liens, sec. 237.

There is not the slightest evidence that Frederick Rossiter, when he purchased that property at the divesting sale, had, nevertheless, agreed to afterwards pay plaintiff's judgment. Even if he were held to have purchased, not for himself, but for the trustees in the declaration of trust, there

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would be no right to conclude, that the purchased lands in their hands would, thereafter, be answerable to the payment of plaintiff's judgment.

On the Mary J. McLaughlin tract, the plaintiff's judgment is not, and never was a lien, and the defendants now defending never were terre-tenants thereof. On the James M. McLaughlin tract the lien was discharged by judicial sale.

Against neither tract is the plaintiff entitled to have a judgment against the defendants de terris.

The motion for judgment in favor of the plaintiff N. O. V. on the whole record is denied.

COMMONWEALTH VS. ZIVANICELLI.

HABEAS CORPUS.—ISSUANCE OF WRIT WITHIN 15 DAYS OF THE QUARTER SESSIONS COURT.

A Court of Common Pleas may not properly direct the issuance of a writ of habeas corpus within 15 days of a sessions of the court of Quarter Sessions even though the judges who sit in the Common Pleas are the same judges as sit in the Quarter Sessions.

In the Court of Common Pleas of Westmoreland County. No. 934 May Term, 1920. Petition for writ of habeas corpus.

D. J. Snyder, for petitioner.

N. A. Cort, District Attorney, contra.

McConnell, P. J.: These proceedings are wholly irregular. On the 4th of May, counsel for prisoner, stating that he had a petition for a writ, was told by the Court, to first confer with the District Attorney. No actual inspection by the Court was at that time made of the formality of the petition. No order for the issuance of the writ was then signed by the Judge of the Court. Counsel, however, must have understood, that the Court need not again be consulted about the matter, after the District Attorney had been consulted, for so it is, that an order purporting to have been made by the Court was endorsed on the petition, and the 5th of May, 1920, at 10 o'clock A. M. is therein designated for a hearing. The petition so endorsed, was then lodged in the Prothonotary's office. On the 5th of May, counsel for the relator again appeared before the Court, accompanied by the District Attorney, and it was then learned the steps that had been taken. There was no return to any writ made by the custodian of the prisoner, nor, indeed, does the petition itself indicate that any writ is to issue to any particular person

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having the prisoner in custody. The caption employed rather indicates a proceeding against the prisoner herself than a proceeding against any one restraining her from liberty. The issuance and service of a writ, nevertheless, being still insisted upon by counsel for the prisoner, we are now disposed to consider the matter in its present status, merely as an application for the issuance of a writ.

This is an application addressed to the Court of Common Pleas praying for a writ of habeas corpus for a prisoner now in the County Jail awaiting trial. The Courts of Oyer and Terminer, General Jail Delivery, and Quarter Sessions of the Peace convene on the 10th day of May, for the trial and disposition of all cases now pending in said criminal courts, and this application is presented within fifteen days of the session of those courts. That being the case, the Court of Common Pleas could not properly grant the writ. The fact that the judges of the Court of Common Pleas also sit in the criminal courts will not serve to give this Court the authority now invoked. Doubtless the provision of the Act of 1785 forbidding the issuance of the writ within fifteen days of the session of the criminal court was to prevent a court not having jurisdiction to try a case, from, by its order, interfering with the proceedings of a Court that has such jurisdiction, and is shortly to engage in the exercise of that jurisdiction; but whatever the statutory motive may have been, the terms employed in the statute are such that the Court of Common Pleas could not properly now direct the issuance of the writ, though the judges who sit in the Common Pleas are the same judges as those authorized to sit in the criminal courts.

In so far as we are now advised, the construction placed on the Act of 1785, by Justice Sergeant, in the case of Com. ex rel. Jack v. the Sheriff, in 7 W. & S. 108, has never been questioned. The application for the writ addressed to the Court of Common Pleas is refused.

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TAYLOR vs. AVONMORE BOROUGH.

BOROUGHS—NEGLIGENCE OF LICENSEE WHO WAS GRANTED THE RIGHT TO MAKE AN OPENING IN THE STREETS

Where a municipality grants a permit to another to occupy its streets for a proper and lawful purpose and the licensee abuses the license by performing the work in a negligent manner, the licensee and not the municipality is liable for the injury.

Where a borough issued a permit to dig a trench in the street from the property line for the purpose of connecting the house of the licensee with the main borough sewer; the connection was made and the work of filling in the trench was apparently well done, yet later plaintiff's horse stepped on the top of the trench and the ground gave way, causing the horse to fall and be seriously injured, in an action for the recovery of damages for such injury, it was held that without any attempt to show that the work was to be done under the inspection of the borough or that the borough had any notice, either actual or constructive, of any defective work or negligence, the plaintiff could not recover.

In the Court of Common Pleas of Westmoreland County, Pennsylvania, No. 674 August Term, 1917. Action for damages for negligent injury to a horse. Tried before the President Judge of the Orphans' Court of Westmoreland County specially presiding. Motion to take off non-suit.

Kline and Kline, for plaintiff.

R. D. Laird and P. K. Shaner, for defendant.

This is a suit by plaintiff to recover damages against defendant for injury to plaintiff's horse caused by an alleged defective construction of a sewer on one of defendant's streets. The statement alleges in substance that defendant, being a municipal corporation vested with control over its public highways and bound to keep the same in a safe condition for public travel, gave to one John Park a permit to dig a ditch or trench in the street from his property line for the purpose of connecting his house with the main sewer of the Borough, and that this work was to be done under the inspection of the Borough, and that the work was so defectively done that when plaintiff's horse stepped on the top of the trench the ground gave way under him causing him to fall and seriously injure himself. At the trial of the case plaintiff proved that defendant was a municipal corporation, that it gave a permit to John Park to make the sewer connection, that the work was done by John Park under this permit and apparently well done, the damages caused when plaintiff's horse stepped on top of the trench and rested. There was no attempt to show that the work was or was to be done under the inspection of the Borough. Neither was there any attempt to show that the Borough had any notice either actual or constructive of any defective work or negligence on the part of John Park, the licensee. On the contrary the evidence disclosed that the work was apparently

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well done and there were up until the time of the accident no surface indications to give notice to anyone that a lurking danger to the traveling public existed in the street, the theory being that, owing to the excessively dry weather, a crust had formed on the top of the trench and that the ground underneath had settled away from the crust, leaving the surface in apparently perfect condition. This being the situation at the close of plaintiff's testimony, on motion of counsel for defendant a compulsory non-suit was entered and we have now before us a motion to take the same off.

Counsel for plaintiff earnestly insist that it is the bounden duty of a municipality to keep it highways in safe condition for public travel and that, therefore, if it grants to another a right to occupy the same for any purpose, it is bound to supervise and inspect the work that is being done by its licensee and if the work is defectively or negligently done so that injury is caused to an innocent third party the municipality is liable for the damages. To this proposition the Court is unable to assent. The cases are so plain and so numerous which decide that a municipality has a right to grant to an independent contractor or an individual the right to take possession of its streets for a proper and lawful purpose without being liable for the negligence of the independent contractor or the abuse of the license by the licensee that extended argument is unnecessary at this late day.

Borough of West Chester vs. Apple, et al. 35 Pa. 284, decided in 1860, was a case very similar to this. In that case the Borough gave a permit to a private individual to connect his property with the city water main and the licensee made the connection and filled up the opening by replacing all the dirt that had been taken out which made a ridge from four to ten inches in height; later a man was driving along the street when his horse stepped on the trench which had been softened by a heavy rain, plunged in, and was injured.

The Borough was sued for damages for the injury, and failing to properly defend the action, a verdict was recovered against it and it then brought suit against the licensee to recover the amount of the verdict. The Supreme Court decided that the Borough could not recover against the licensee, because the Borough itself was not liable for the injury and should have protected itself by a defense to the action against it and not by subrogation to another. The facts in

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that case are so nearly on all fours with the facts in this case and the opinion is so clear and explicit on the very question involved here that further citation of authorities seem unnecessary. Susquehanna Depot vs. Simmons, 112 Pa. 384 decided in 1886 is equally explicit on the same point and this case is cited with approval in Levenite vs. City of Lancaster, 215 Pa. 576 decided in 1906. It may, therefore, be taken as settled in Pennsylvania that where a municipality grants a permit to another to occupy its streets for a proper and lawful purpose and the licensee abuses the license by performing the work in negligent manner the licensee, and not the municipality, is liable for the injury.

We have gone carefully over the cases cited by plaintiff's counsel, but find nothing that in anyway modifies the above legal conclusion. Early vs. Philadelphia, 255 Pa. 153 and other cases are cited to show that this case should have gone to the jury. In the cases cited, however, it appears that there was conflicting evidence as to whether it was the municipality or the contractor or licensee that, in fact, had possession of the streets at the points where the accidents occurred or whether the municipality itself or some other was responsible for the manner in which the work was done. In this case there is no such fact in dispute—there is no evidence that the Borough of Avonmore had anything to do with the work and there was, therefore, nothing to submit to the Jury.

AND NOW, June 24, 1920, the motion to take off the non-suit is refused.

MILLER ET AL. VS. JOHNSON ET AL.

JOINT COUNTY BRIDGE.—POWER TO CLOSE SUCH BRIDGE UNDERGOING REPAIR.—DISCRETION OF COUNTY COMMISSIONERS.—INTERRUPTION OF PUBLIC SERVICE BY REASON OF THE CLOSING OF A BRIDGE.—PUBLIC SERVICE COMMISSION.

The County Commissioners have lawful authority, in the exercise of the duties cast upon them by the Statutes regulating inter-county bridges, to make such repairs and should it be necessary for the purpose of properly making such repairs to close the bridge temporarily and for a reasonable time.

The duty rests upon the County Commissioners in such cases to determine in the exercise of their official judgment and whether such temporary closing is necessary.

Unless the decision of the County Commissioners is so plainly, manifestly and egregiously wrong that it can be pronounced an abuse of discretion, the Court ought not by injunction to set it aside, substituting its judgment in the place of the official judgment of the Commissioners.

Notwithstanding the fact that the plaintiffs had a certificate of public convenience for the operation of their vehicles in the carriage of passengers over a road which embraces an inter-county bridge, the Public Service Commission, under the Act of 26 July, 1913, P. L. 1374, did not acquire jurisdiction over the highways to be used by the plaintiffs in the carriage of their passengers so that the authorities charged with the care of such highways may not close them temporarily to make repairs without applying for and obtaining the permission of the Public Service Commission so to do.

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In the Court of Common Pleas of Washington County. Sitting in Equity. No. 2727 Equity Docket. Motion for preliminary injunction against the County Commissioners of the Counties of Washington and Westmoreland to restrain them from closing the Donora-Webster Inter-County Bridge.

D. M. Anderson, Acheson & Crumrine, for the plaintiffs.

Alvin E. Doonan, County Solicitor for Washington County. William S. Rial, County Solicitor for Westmoreland County, for defendants.

Brownson, J.: The bridge over the Monongahela river, extending from Donora in Washington county to Webster in Westmoreland county, is an inter-county bridge, built by said two counties and the boards of County Commissioners thereof are jointly charged with its maintenance and repair. They are now engaged in making repairs of this bridge. The plan of these repairs includes the construction of concrete flooring upon the bridge approaches. The commissioners have given public notice that during the construction of this flooring the bridge will be closed to vehicle travel, and the plaintiffs who are operating a line of passenger motor omnibuses, upon a route which passes upon and over this bridge, have applied for a preliminary injunction to restrain the county commissioners and their contractor from so closing the bridge to public travel.

The plaintiffs set up, as the ground upon which they are entitled to equitable relief, that such interruption of vehicle traffic will result in the following injurious consequences; (1) Plaintiffs are required by the certificate of public convenience granted to them by the Public Service Commission to maintain an uninterrupted service upon the route aforesaid, and if they are prevented from so doing by the closing of the bridge they may forfeit their certificate; (2) such interruption in the use of the bridge for the purposes of their business will cause them to suffer a considerable loss of revenue; and (3) an interruption of their passenger traffic will work great inconvenience and detriment to the general public.

This proposed temporary closing of the bridge to vehicle traffic will not prevent the plaintiffs from operating their transportation facilities upon any part of their prescribed route other than the bridge itself; they may still run their omnibuses on either side thereof, so that passeng-

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ers, alighting from an omnibus at one end of it, may walk across the bridge (which is not proposed to be closed to foot passengers) and take another omnibus, for the purpose of pursuing their journeys, after so doing. True, this would impose upon the plaintiffs increased operating expenses, making it necessary to hire two additional employes and to rent temporarily some storage accomodations at the Monessen end of their route, and it would be somewhat inconvenient for the traveling public but it could be done. And if they should continue to serve the public to this extent, we take it that (assuming that the bridge is lawfully closed temporarily to vehicles) the Public Service Commission would neither be disposed nor permitted to declare a forfeiture of their rights because they were thus, by causes beyond their own control, prevented from operating over the whole of their prescribed route, even if, in other circumstances, a forfeiture might be declared.

In any event, however, it may be a question whether a private party can maintain a bill against the officers in charge of a highway for the purpose of preventing an interruption of such party's traveling, in common with the general public, over the highway, even though it be alleged that the consequentially resulting inconvenience and loss in his business will be one special to the plaintiff; see Gold V Philadelphia, 115 Pa. 184, Phila. etc., Ry. Co. V. Philadelphia 11 Phila. 358; Naugle V. Nescopeck Twp.; 255 Pa. 68.

But, passing over the question of the standing of the plaintiffs to sue, let us consider whether it is proper, by injunction, to restrain the county commissioners from carrying out their plans.

This bridge is under the charge and care of these boards of county commissioners. They are, as public officers, in control of it. It is their official duty to determine when it needs repair, and what the nature of the repairs should be. If the flooring of either the bridge proper or the approaches needs renewing, they have the official discretion to determine what kind of new flooring is requisite to make it answer the requirements of public travel. And the time and manner of doing the work of thus repairing the structure are matters to be decided by them in the exercise of their official discretion. The commissioners have decided that the approaches of this bridge, consisting of viaducts lead-

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ing at either end to the bridge proper which spans the river, ought to be floored with concrete upon the cartway thereof. Upon the advice of their engineer they have decided that, during the process of laying this concrete, and until it shall have had time to set, it is necessary that the bridge shall be closed to vehicle traffic, in order to keep the concreting free from the interference of vibration with its setting properly, and they have accordingly directed their contractor so to close it. Upon the correctness of this decision, and the practicability or impracticability, by the use of certain precautionary measures, of properly constructing the concrete flooring while keeping the bridge open to travel, the evidence in the case is conflicting. The plaintiffs ask us to decide that the commissioners are wrong in their decision, and that it is practicable to keep the bridge open while the concreting is being done.

It would seem to us that upon this question the weight of the evidence does not preponderate in the plaintiffs' favor. But is it proper for the court to review such a decision made by the county commissioners, and to substitute its judgment upon such a question in the place of theirs? The discretion of public officers, acting within the limits of their authority, cannot be controlled by injunction: Throop on Public Officers, sec. 849, quoted in Oakford v. Sheatz, 19 Dist. R. 1113, 1114; Gaines v. Thompson, 74 U. S. 347; Warfel v. Cochran, 34 Pa. 381; Roth v. Marshall, 158 Pa. 272, 274; Henderson Coal Co. v. Sadler, et al, No. 2678 Equity Docket, in this court. There are many other authorities to the same effect. "Equity can only interfere with the functions of the county commissioners either for disregard of a positive duty as prescribed by statute, or a clear abuse of discretion:" Bradbury v. Burschell, 220 Pa. 439, 446, opinion of Newcomb, J., adopted by the Supreme Court. "If an officer neglects or refuses to enter upon the discharge of a duty which the law imposes upon him, the courts will quicken or compel action by a writ of mandamus. If he goes beyond what the law requires, attempts that which is ultra vires, or abuses his discretion in any manner, the courts will restrain him by injunction. The ground intermediate these extremes is the legitimate range of official discretion, within which the officer, on whom the law has cast a duty, may determine the manner of its performance: "Mr. Justice Williams in Roth v. Marshall, supra, at page 274.

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It is clear that these commissioners have lawful authority, in the exercise of the duties cast upon them, by the statutes regulating such bridges, to make these repairs, and, should it be necessary so to do for the purpose of properly making the repairs, to close the bridge, temporarily and for a reasonable time, to that end. It is clear also that the duty rests upon them to determine, in the exercise of their official judgment and discretion whether such a temporary closing is necessary. In deciding that a closing is necessary in this instance the commissioners are not shown to have acted in bad faith, or otherwise than in the exercise of their honest judgment, and in support of this judgment they have presented professional and expert opinions. The fact that in the original contract for the doings of these repairs they stipulated that the contractor should at all times keep the bridge open for travel does not impeach their good faith in subsequently changing their views to the extent of coming to the conclusion that a closing during the concreting work is necessary. Unless this decision is so plainly manifestly and egregiously wrong that it can be pronounced an abuse of discretion, the court, under the authorities above cited, ought not to set it aside, substituting its judgment in the place of the official judgment of the commissioners. We cannot so say under the evidence in this case.

It is suggested, however, that when the Public Service Commission granted to the plaintiffs a certificate of public convenience for the operation of their vehicles in the carriage of passengers over a route which embraces this bridge, the Commission not only acquired jurisdiction over the plaintiffs in the matter of requiring them to comply with their duties in the premises, but also acquired jurisdiction over the highways to be used by them in the carriage of their passengers, so that the authorities charged with the care of such highways may not close them temporarily to make repairs without applying for and obtaining thé permission of the Public Service Commission so to do. It is argued that if without such permission this bridge be closed by the county commissioners for this purpose, whereby the plaintiffs are for a few days prevented from maintaining upon this portion of their prescribed route the uninterrupted service which it is their duty to maintain under the Public Service Company Law of 1913, P. L. 1374, that law is to this extent rendered inoperative, and hence the act of the county

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commissioners in ordering the bridge closed (for which they have not sought and obtained any permission from the Public Service Commission) is void and of no effect as applied to the plaintiffs. There is in the statute no express requirement that such permission shall be obtained, and we do not think it is implied. We discover nothing in the act manifesting an intention to repeal, modify or affect the operation, to any extent, of the other laws by which the control of highways is placed in the hands of other governmental agencies, except that the Commission is given jurisdiction of the manner in which public highways, and the tracks or other works of public service companies, shall be constructed and maintained at crossings. Had it been intended to grant any further jurisdiction over highways, and thus to limit the control over them vested in other authorities, undoubtedly there would have been in the act express provision to this effect. Nor can it in a just sense be said that when the highway authorities temporarily close a portion of a road because the proper exercise of their duty to the public renders it necessary so to do, they thereby render inoperative so much of this statute as requires a carrier of passengers who operates omnibuses over it to maintain an uninterrupted service; such requirement must be given a reasonable construction, and should be considered as contemplating that such a carrier, like the rest of the public, shall subordinate himself to the exigencies and necessities connected with and arising out of the doing of such repair or reconstruction work as the public interest demands shall be done.

Upon the whole we do not think we would be justified in granting the injunction asked for.

And now, July 8, 1920, after argument and due consideration, the motion of the plaintiffs for a preliminary injunction is denied.

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TARR VS. HECLA COAL & COKE CO.

WORKMEN'S COMPENSATION ACT OF 1915.—EMPLOYES TEMPORARY EMPLOYMENT.

Where a coke company requested a neighboring company to send some of its employees to engage in work temporary in character under the direction and control of the requesting company without any specific agreement as to the pay of the men to be furnished and while the employee was so engaged he was killed in the course of that employment, it was held that such relationship created a liability under the Workmen's Compensation Act of 1915.

In the Court of Common Pleas of Westmoreland County, Pennsylvania. No. 457 February Term, 1919. Appeal by an insurance carrier as intervening defendant from the decision of the Workmen's Compensation Board.

Moorhead & Smith, Dalzell, Fisher & Hawkins for appellant.

Gaither & Whitten, for claimant.

SNYDER, J.: The appellant is an insurance company. In the regular course of its business this company insured The Hecla Coal & Coke Company "against liability arising under the Workmen's Compensation Act of 1915 for the year 1918." On the 14th day of June, 1918, James Tarr, while working in one of the mines of The Hecla Coal & Coke Company "was asphyxiated by the gas in the burning mine resulting in his death the same day."

The whole question before the Court now is—Whether James Tarr was an employe of The Hecla Coal & Coke Company at the time of his injury. The Workmen's Compensation Act of 1915 provides that the findings of fact by a Workmen's Compensation Board "shall in all cases be final." Our appellate courts have decided a number of times "that the courts cannot review findings of fact of the Referee and Workmen's Compensation Board." McCarl v. Houston Borough, 263 Pa. 1; McCauley v. Imperial W. Company, 261 Pa. 312; Poluskiewicz v. Phila. & R. C. & I. Co., 257 Pa. 305.

Do the facts as found by the Referee and affirmed by the Workmen's Compensation Board warrant their conclusion that James Tarr was an employe of The Hecla Coal & Coke Company at the time of his injury? An employe "as used in said act" is declared to be synonymous with servant and includes all natural persons who perform services for another for a valuable consideration. The facts relevant to the point in issue found as aforesaid are as follows:

On the 14th day of June 1918 "the superintendent of No.

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2 mine of The Hecla Coal & Coke Company made a request in writing to the superintendent of the Frick Coke Company to send three men trained in rescue work." James Tarr was sent in pursuance of this request. On his arrival at the mine he and "certain employes of The Hecla Coal & Coke Company mine were placed by its superintendent under the immediate direction and control of the foreman of this mine." "While engaged in work for which he had been sent" he was injured. There can be no question but that James Tarr at the time of his injury was "performing services" for The Hecla Coal & Coke Company at its special instanec and request and "under the immediate direction and control of its superintendents and foreman."

The question then arises: Were these services performed for a valuable consideration? The Referee finds that "there is no specific agreement as to the pay of the men to be furnished but they were usually given a voluntary payment for the services performed." There is no finding of fact that would indicate that the services of James Tarr were to be gratuitous, neither is there anything in these findings that would raise a presumption of law to that effect. On the contrary it is well settled law that wherever services are rendered and received an obligation to pay will be presumed.

"If one procures work or services from a person under no special ties of relationship or the like, or knowingly receives the benefit of them, the law creates the presumption to pay for what he accepts to his own advantage." Bishop on Contracts, page 87.

Had James Tarr not been killed he would have been entitled to compensation for these services. The conclusion must inevitably follow that the services were rendered for a valuable consideration. Therefore, as James Tarr was performing services for The Hecla Coal & Coke Company at the time of the injury for a valuable consideration, he was anemploye of that company at that time.

In addition to this the Workmen's Compensation Board found as a fact that James Tarr was to receive no pay from the Frick Coke Company for the time he might be required in performing the work at the mine of The Hecla Coal & Coke Company. It is earnestly argued that the Board had no right to find this fact under the circumstances. In view

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of the conclusion reached as above set forth we do not deem it necessary to decide this question.

Another question argued at great length was that The Hecla Coal & Coke Company in the argument in behalf of the claimant was committing an act "wrong in morals and in law." This argument did not appeal to the Court. It seems to us to be proper for a corporation to take care of its employes and see that they get justice. We do not think the standard of morals of the officers of a corporation of a high order that does not do so.

And now, May 10, 1919, after due consideration the above mentioned appeal is dismissed at the cost of the appellant.

EAST END MANTLE AND TILE CO. vs. GREENSBURG PLUMBING CO.

MECHANICS' LIENS—ALTERATIONS AND REPAIRS—SUB-CONTRACTORS—NOTICE—RIGHT OF CONTRACTOR TO DEFEND—TRUSTEE IN BANKRUPTCY—ACT OF JUNE 4, 1901.

Under the Act of June 4, 1901, Section 11, par. 11 P. L. 431, a mechanics' lien filed by a sub-contractor for alterations or repairs, must show on its face when and how the written notice to the owner of an intention to file the claim required by section 2 was given to him.

The notice required by section 2 is not to be confounded with that required by section 8. An averment in the lien of the service of a notice such as is required by section 8 cannot be regarded as a substitute for what is required by section 2, and will not cure the omission of an averment showing that notice under section 2 was duly given. Not decided whether, in cases of liens filed for alterations or repairs, the lien should show a service of notices under both sections.

The general contractor or his trustee in bankruptcy may maintain a motion to strike off a sub-contractor's lien, "when the lack of legality is demonstrable from the record."

Motion by Contractor to strike off Mechanics' lien.

In the Court of Common Pleas of Westmoreland County, Mechanics' Lien Docket, No. 5007.

Walkinshaw & Walkinshaw, for rule:

Shaw & Silsley, contra.

McConnell, J. Feb. 2, 1907.—The function which section 2 of the Act of June 4, 1901, P. L. 431, performs is to define the cases in which properties may be subjected to a lien. The attempt to do so consists of both affirmative and negative provisions. Among the negative provisions is to be found the following: "Nor shall any claim for alterations or repairs, or for fitting up or equipping old structures with machinery, gearing, boilers, engines, cars or other useful appliances be valid, unless it be for a sum exceeding $100, and in case of a sub-contractor, unless also written notice of an intention to file a claim therefor, if the amount be not paid, shall have been given to the owners or some one of them, or for him to an adult member of his family, or the

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family with which he resides, or his architect, agent, manager or executive or principal officer, on or before the day the claimant completed his work or furnished the last of his materials."

The 11th section of the act prescribes the contents of the claim to be filed. The 11th paragraph of this section prescribes as follows: "When the contract is with other than the owner, or the claim is for alterations or repairs or for fitting up old structures with machinery, when and how notice was given to the owner of an intention to file the claim."

According to the lien filed, (1) the contract was with other than with the owner, (2) the lien is for work and labor done and materials furnished for and about the alteration and repair of said structure, and (3) that all the labor and materials so furnished and for which this lien is filed, were furnished continuously from June 13, 1906, which is the date when claimant first furnished labor and materials, until and including July 7, 1906, which was the date when claimant last furnished labor and materials.

The first two of these things, viz: (1) that the contract was not the owner, and (2) that the lien was for alteration and repairs, are inserted in the lien in compliance with paragraph 11, section 11, above quoted, but a third thing required thereby does not appear in the lien, viz: "when and how notice was given to the owner of an intention to file the claim."

The third thing that actually appears in the lien as filed and which we referred to above was inserted therein pursuant to the 9th paragraph of section 11, which reads as follows: "9. When the claimant first furnished labor or materials thereto, and when he last did so."

Therefore, three statutory essentials of a valid lien are manifested by an inspection of this lien to be, (1) that the contract was not made with the owner; (2) that the lien is for alteration and repairs, and (3) that claimant last furnished labor and materials July 7, 1906. These three things being inserted in the lien as filed pursuant to statutory requirements must be accepted as correct for the purposes of this motion.

But we have no averment as to when and how notice was given to the owner of an intention to file the claim—a thing which the 11th paragraph expressly demands.

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It does, indeed, appear in the lien as filed that claimant attaches hereto and makes part hereof a true and correct copy of the notice to the owner of a claimant's intention to file a mechanic's lien, given under section 8 of the Act of liens, which was served Aug. 8, 1906, in the manner set forth in the affidavit attached thereto, which is also made part hereof.

But while intent to file a lien appears both in the notice required under the 2nd section of the act and in the notice required by the 8th section of the act, yet the general substance and the designed function and effect of these two kinds of notices are entirely different. The notice which the 2nd section makes essential to the right to file a lien under the circumstances therein recited is the same notice that paragraph 11, section 11, refers to, and prescribes that "when and how it was served" shall appear in the lien. The notice provided for by section 8 is not the notice that section 11, paragraph 11, refers to, and requires in the lien a statement of when and how it was served. Section 2 says that any claim for alterations and repairs shall not be valid unless it be for a sum exceeding $100, and in case of a subcontractor (that is what we have here), "unless also written notice of an intention to file a claim therefor, if the amount be not paid, shall have been given to the owners, etc., on or before (the) days the claimant completed his work or furnished the last of his materials."

From the lien we learn that July 7, 1906, was the date when claimant last furnished labor and materials. We also see that the notice referred to in the lien was served, Aug. 8, 1906, a date thirty-one days after claimant completed his work or furnished the last of his material instead of on or before that day, as the 2nd section requires.

Therefore, if the 11th paragraph of the 11th section, making "when and how notice was given to the owner of an intention to file the claim" a constituent element of a valid claim, refers to the notice provided for in section 2, then what is contained in the lien with respect to a notice under the 8th section does not show claimant's right, for it thereby appears that notice was not served until thirty-one days after the time the last work was done, whereas section 2 makes service necessary on or before the last day on which work and materials were furnished.

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The 2nd section makes service at the time prescribed an indispensable requisite to the right to file a lien at all in the cases to which it applies; therefore, a notice served thirty-one days too late will not be effacious to confer the right to file a lien.

The vital point in this case is to determine whether paragraph 11, section 11, refers to the notice mentioned in section 2, or whether it refers to the notice provided for in section 8, as claimant seems to have understood. If we look at the function that each of these notices is designed to perform, there can be little doubt about the matter.

(1) A lien such as this is, for alterations and repairs, stands on a different footing under the act from a lien for erection and construction. Its inception is wholly dependent on an act on the part of a claimant indicative of an intent to claim a lien for work of that kind, while a lien for erection and construction has its inception from the visible commencement of the structure upon the ground.

The 13th section, inter alia, provides as follows: "The lien of every claim for the alteration of or repair to a structure or other improvement ....* ....* ....* ....shall take effect as of the date of its filing, ...* ....* ....* ....but such lien shall be wholly lost if the property be conveyed in good faith and for a valuable consideration prior to the filing of the claim. In all other cases the lien of the clai mshall take effect as of the date of the visible commencement upo nthe ground of the work of building the structure or other improvement."

The 2nd section deals with both these kinds of lien; but with respect to a lien for alteration and repairs, it prescribes a prerequisite to the filing of that kind of lien which has its incipiency at the date of filing, viz., that the owners shall have been given written notice of an intention to file. It provides, inter alia: "Nor shall any claim for alterations or repairs ....* ....* ....be valid unless it be for a sum exceeding $100, and in the case of a sub-contractor, unless also written notice of an intention to file a claim therefor, if the amount be not paid, shall have been given to the owners ....* ....* ....* on or before the day the claimant completed his work or furnished the last materials."

Neither the owner nor any one else needed any such notice with respect to filing a lien for erection and construction, for the law informed every one that as matter of course such a lien had its incipiency at the visible commencement of the

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structure on the ground, but with respect to alteration and repairs, the lien was not, under the law, a matter of course, but was entirely dependent on claimant's election to file his claim as a lien, and it was deemed a reasonable requirement to exact from a sub-contractor, with whom the owner had personally made no contract, a notice of his intention to file, and that that notice shall be in writing and be served on or before the day the claimant completed his work or furnished the last materials, otherwise an owner would be apprised only by the act of filing that his property had been subjected to a lien by one with whom he had personally made no contract and without having had any previous notice from the law or from any other source.

By the Act of May 18, 1887, P. L., 118, a right to file a lien for repairs, alterations and additions was first expressly conferred, and under it notice of an intention to file a lien at the time of furnishing or performing the work was required, even though the law in that case put such a lien on the same footing with liens for erection and construction. Under that act, it was held that there could be no lien without compliance with the provision of the act with respect to notice.

Under the 2nd section of the Act of June 4, 1901, P. L. 431, which repealed and supplied the Act of 1887, the right to file a lien for alteration and repairs is made more exceptional, and expressly declares that there shall be no lien without the giving of the written notice required by section 2. With respect to the Act of 1887, it was held that notice to the owner or reputed owner at the time the work is done or materials furnished of an intention to file a lien therefor is a necessary prerequisite to the lien, and this even when the work or materials are furnished directly upon the owner's order: Groezinger v. Ostheim, 135 Pa. 604; Chester City Presbyterian Church v. Conlin, 19 Pa. Superior Ct. 515.

Under the Act of 1901, the giving of the notice in the cases to which the notice pertains is expressly made a prerequisite to the right to file a lien, and no construction by the courts is needed to give it that application. This notice, therefore, goes to the very substance of the right, and is not pertinent to some mere incidental matter.

If its intended function was so important as that, we would naturally suppose that the lawmaker would require

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compliance with the terms of the law, upon which alone the right was given, to be shown on the face of claimant's lien, and when paragraph 11 of section 11 can have that application without doing any violence to the language of the paragraph, we are reasonably prompted to give it such application. This seems the more reasonable construction when we observe the fact that alterations and repairs are to be found in the 2nd section, grouped with other kinds of works, described therein by words that reappear in the same associated way in the 11th paragraph of section 11.

The 2nd section says: "Nor shall any claim for alterations or repairs, or for fitting up or equipping old structures with machinery, gearing, boilers, engines, cars or other useful appliances be valid unless it be for a sum exceeding $100, and in the case of a sub-contractor, unless also written, notice of an intention to file a claim therefor be given as therein set out." Read that language and then turn to the 11th paragraph of section 11, and we find therein only a somewhat condensed form of saying precisely the same thing. It says: "When the contract is with other than the owner or the claim is for alterations and repairs, or for fitting up old structures with machinery, gearing, boilers, engines, cars or other useful appliances, when and how notice was given to the owner of an intention to file the claim."

Placing these two collocations of words together and observing their substantial identity and association of subjects, it is not hard to conclude that, in the mind of the lawmaker, the notice referred to in each of them was one and the same.

Again, we have in section 13, which deals with the question of when the lien begins, another repetition of the same collocation of words: "The lien of every claim for the alteration of or repair to a structure or other improvement, or for fitting up old structures with machinery, gearing, boilers, engines, cars or other useful appliances, shall take effect as of the date of its filing. In all other cases the lien of the claim shall take effect as of the visible commencement upon the ground of the work of building the structure, etc."

These cases that we find associated in the same way in these three sections of the act are so associated for the purpose of differentiating such cases from cases in which a lien

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attaches as a matter of course and before any filing of a paper to define them has been made. The subject-matter is the same in all these three sections. We can readily believe that when paragraph 11, section 11, requires a claimant in such cases to state in his lien when and how notice was given to the owner of an intention to file the claim, that it refers to the notice which section 2 makes a prerequisite to the right to file a lien at all in such cases, viz: "Written notice of an intention to file a lien therefor, if the amount due be not paid, (which) shall have been given to the owners or some one of them or for him to an adult member of his family, or the family with which he resides, or to his architect, agent, manager or executive or principal officer, on or before day the claimant completed his work or furnished the last of his materials." There are a variety of ways in which the claimant may legally serve the notice, and it is essential that he serve in one of those ways. There is, therefore, good reason for requiring him to state in the lien "how" he served it. The notice must be served "on or before (the) day the claimant completed his work or furnished the last of his materials." There is, therefore, good reason for requiring the claimant to state in his lien "when" the notice was served. By complying with paragraph 11 and stating in the lien "when and how notice was given to the owner of an intention to file the claim," we may at once know therefrom whether a claimant, in a case differentiated from the ordinary case of mechanic's lien, as the cases in these three sections are, has the right to file at all or not.

There seems to be no obstacle in the way of thus applying paragraph 11, section 11.

(2) But what function is the notice provided for in section 8 to perform? We have that notice given in the lien as it remains on file. An inspection of that section will show that the notice therein referred to was not designed to have any effect on the creation of the right to file the lien. It is therein assumed that the right exists. It provides in part as follows:

"Section 8. Any sub-contractor intending to file a claim must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, the kind of labor or materials furnished and the

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date when the last work was done or materials furnished * * * After such notice and until the claim is finally defeated, the owner may, unless approved security be given to indemnify him from loss, retain out of any payment due or to become due the contractor a sum sufficient to protect him from loss."

"Section 9. An owner served with the notice and sworn statement aforesaid may serve a copy thereof upon the party personally liable for the debt therein referred to, with notice that unless such claim is settled within fifteen days thereafter or he is furnished with a sworn statement setting forth wherein it is intended to be disputed, he may pay the same and deduct the amount thereof from the contract price or hold the contractor personally liable for any loss. If the contractor approves the claim or fails to serve a sworn statement of defence thereto, the owner may, before the filing of the claim or at any stage of the proceedings thereon, pay the same and deduct the amount thus paid from the contract price or hold the contractor liable for any loss. Upon payment of his claim, the sub-contractor shall assign or transfer to the owner his claim against the contractor and any note or other collateral security he may have received for its payment. If the contractor gives notice of a defence thereto, it shall be his duty to defend any claim filed at his own expense, and if he fails or refuses so to defend or continue defending it, he shall be liable to the owner for all costs, expenses, charges and the reasonable counsel fees necessary for making such defense, whether successful or not."

The purpose of these two sections, when taken together, is obvious. The owner has it in his power to protect himself by the terms of his contract with his contractor, but inasmuch as sub-contractors, with whom the owner does not personally deal, may acquire a right to file a lien, the act seeks to put in the owner's hands power to protect himself by requiring sub-contractors to give him notice of their intent to file a lien, with a statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, etc. The owner, when thus armed with this precise information, can call on the man with whom he personally contracted to indemnify him, or if that is not done, it invests him with power to indemnify himself by

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throwing the burden of the contract made with the sub-contractor on him who had personally contracted with such sub-contractor, viz., on the contractor himself. It is but a system of procedure for working out the equities and legal liabilities of the various interested parties among themselves, and pertains but to difficulties that are by experience found to be incidental to the enforcement of a mechanic's lien law. A failure to give the notice required by section 8 might forfeit the remedy the sub-contractor has had given to him by the law, but the giving of that notice does not create the right to the remedy. By section 7, both the owner and contractor can quicken proceedings by requiring any party named to file his claim within fifteen days after notice of such rule, or be forever thereafter debarred from so doing. When a sub-contractor has been thus ruled to file his claim, he need not give the notice and data to the owner that the 8th section requires, for that section expressly says: "But no such notice or statement need be served if the sub-contractor be ruled to file his claim before the expiration of the periods therein named." Under these circumstances, the right still exists, notwithstanding the fact that no notice under the 8th section was given to the owner; therefore, the notice does not create the right, nor does it perform any function in creating it.

Why procedure ancillary to the purposes embodied in sections 7, 8 and 9 should be set out in the body of the lien is not obvious. The notice therein provided for only deals with matters incidental to a lien when the right already exists, not with matters that are fundamental to the right of filing a lien. The lien need express only that which is fundamental. The 11th paragraph only appeals of "when and how notice has been given to the owner of an intention to file the claim," while what is provided for in section 8 is something more than such a notice, for it is to be "together with a sworn statement, setting forth the contract, etc." The reference of paragraph 11 only purports to grasp a "notice," and that reference would be fully satisfied by the notice provided for in section 2, for that is a notice alone.

We, therefore, conclude that paragraph 11, section 11 requires the lien to show on its face when and how the notice required by section 2 was given to the owner. This lien does not show that. The claimant being a sub-contractor, and the

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lien showing that it is claimed for the alteration and repair of the structure therein described, has not shown that it has a right to file a lien, and the one filed lies open for the application of a rule to strike off for that reason.

It also appears from the depositions that as a matter of fact no such notice was ever given. The right to strike off for this latter reason is not so clear as the right to strike off for the lack of a statement in the lien which the statute has required to be there. The exigencies of this case are not such as to require us to determine whether or not the service of the notice required by the 8th section must also be made to appear in the lien. We are clear that the service and the time thereof of the notice provided for in the 2nd section must be made to appear in the lien in a case of this kind, and that the appearance in the lien of the service of a notice, such as is required by section 8, thirty-one days after the day the claimant completed his work or furnished the last of his materials, cannot be regarded as a substitute for what is required by section 2, and which is entirely wanting in this case.

A Mechanics' lien is purely statutory, and a compliance with the statutory requirements is necessary in order to give it validity. There is no intendment in its favor. It must be self-sustaining and must show on its face that it is such a lien as the statute authorized the claimant to file: Knelly v. Horwath, 208 Pa., 487; Wolf Co. v. Pennsylvania R. R. Co., 29 Pa., Superior Ct. 439.

This lien does not show on its face that claimant had the right to file it.

The next question for consideration is whether the present petitioner, John Barclay, trustee in bankruptcy of the contractors, has any right to raise and have ruled by the court the question above considered. Let it be assumed that the trustee has no right to raise any question that the contractors have not the right to raise. In part, the petition is based on the affidavit of the owner, wherein its appears that no notice was served on her except the notice which was served on Aug. 8, 1906, under the 8th section of the act. This is no more than averment that the fact accords with the conclusion that must be drawn from the lien itself.

It is alleged that the absence of this notice to the owner is not a thing that the contractor can complain about. As

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we have endeavored to show, the thing that is wanting in this case is a thing that is a prerequisite to the right to file a lien. The 2nd section says a claim for alteration and repairs, where there is a sub-contractor, shall not be valid unless written notice of an intention to file a claim therefor be given to the owner "on or before the day the claimant completed his work or furnished the last of his materials." It is, therefore, demonstrated, by the record that this claim is invalid. There is no authority given by the law for filing this lien. Is the contractor in any way interested in that question?

Under the Act of 1901, the contractor is made a defendant along with the owner. In so far as the contractor is concerned, a personal judgment may be recorded against him if there is a right to recover on the lien; but if there is no right to file the lien at all, it would hardly be pretended that it was the purpose of the Act of 1901 to authorize a recovery in this form against him, instead of requiring the sub-contractor to sue in an ordinary action on his contract with the contractor. A personal judgment as the incident of a recovery in rem is the thing that the Act of 1901 authorizes. If there is no authority to recover a judgment in rem, there is no authority to recover one in personam against the contractor.

By the 7th section, both he and the owner can rule the sub-contractor to file his claim for the purpose of speeding the cause. By the 9th section, an owner served with the notice and statement authorized by section 8 can, by serving a copy thereof on the contractor, require at his hands a settlement of the claim within fifteen days, or a sworn statement setting forth wherein it is intended to be disputed. "If the contractor give notice of a defence thereto, it shall be his duty to defend any claim filed at his own expense, and if he fails or refuses so to defend or continue defending it, he shall be liable to the owner for all costs, expenses, charges and the reasonable counsel fees necessary for making such defense, whether successful or not."

If the claim was not a lien at all, certainly the owner could assert that. If a contract, cognizant of a fact that would show that the claim was not a lien, he can be required to maintain that defence at his own costs. Independent of that, he has personally a right to object and defend against

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the appropriation of his money in the hands of the owner to the payment of a sub-contractor's claim, on the mere assumption that it was a valid lien, when, in law and in fact, that sub-contractor's claim was not a valid lien at all. He might be liable personally to pay the sub-contractor's claim, yet he would have the right to object to the sub-contractor attaching his money in the hands of the owner without any warrant of law, and only on a pretended right of the sub-contractor that he is entitled to a lien on the owner's property. The contractor ought to be allowed to show the pretence to defeat the action. He has a right to file an affidavit of defense, and if he does so, no judgment can be entered against the owner for want of an affidavit of defence: See section 34.

I am of opinion that, under the Act of 1901, the contractor has a right to set up a defence against a sub-contractor's claim for lien that the claim is not a lien, and if he has the right to do that in an affidavit of defence or on the trial of the case in court, he has the right to set up the same defence when the lack of legality is demonstrable from the record; that is to say, he has the right to move to strike off a lien from the record.

If the contractor has the right to do this, the trustee of the contractor may do the same thing in behalf of the creditors, who are entitled to have the contractor's money distributed among them equally. In Wethered v. Garrett, 140 Pa. 224, it was decided that "the sufficiency of the description in a mechanic's lien of the building against which it was filed is a matter that affects and concerns the owner only, and when he has suffered judgment by default in a scire facias on the lien, the contractor, sued with him, has no standing to defend on the ground that the building was not properly described."

Through an argument based on that case, we are asked to hold that neither the contractors nor their trustee in bankruptcy have any standing to assert that the sub-contractor's claim in this case is not valid lien against the owner's property. The case cited falls far short of going to the extent urged in this case. Possibly the same case would be decided in the same way under the Act of 1901 as it was decided under another act in Wethered v. Garrett, 140 Pa. 224. It is, however, readily seen that the mere insufficiency of

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the description of the owner's property, when not raised by him, is quite different in its effect upon the contractor from the entire invalidity of the alleged lien. In the former case, he is not injuriously affected, at all; but in the latter case, he is injuriously affected.

In addition to that, under the Act of 1901, he is permitted to interpose the defence that the claim is no lien at all, and the maintenance of such a defence can be conducted at his charge. Whatever the contractor's right may or may not have been under other acts of assembly with respect to the legal formality of the lien or the right of the claimant to file one at all, it seems to me that the Act of 1901 allows him to be heard. If he has that right, his trustee in bankruptcy, whose function under the law is to secure equal distribution among the creditors of the bankrupt, ought to have the right to show that a pretended lien which, if valid, would destroy the equality of distribution which he is to effect is in law no lien at all. He does have that right.

And now, Feb. 2, 1907, upon due consideration by the court, the rule granted Nov. 27, 1906, to show cause why the lien in this case should not be stricken off, is made absolute for the reasons given in an opinion this day filed.

DECKER vs. COMMONWEALTH.

Certiorari.—Summary conviction—Record of Justice of the Peace.—"Violation of Game Laws."—Act of May, 1909, Sec. 19, P. L. 325.—Hunting deer with dogs.

Where in a summary conviction the Justice's record shows the imposition of a fine without adjudging the defendant to be guilty of any offense and the docket entry shows no charge preferred against him except what is expressed in the indefinite caption of the case "Violation of game law," such record is insufficient and will be reversed on certiorari.

In the Court of Common Pleas of Westmoreland County. No. 722 May Term, 1920. Certiorari.

Eicher & Eicher, for plaintiff in error.

No appearance for defendant in error.

McConnel, P. J.: The caption in the Justice's docket-entry states the case of the Commonwealth against the defendant in the proceeding, (the plaintiff herein), as follows: "Violation of the Game Law."

The part of the record showing the Justice's disposition of the case is as follows: "And now April 16, 1920, parties appear and case is continued to April 19, 1920, between 1 and 2 P. M. And now April 19, 1920, parties appear, and the case is heard. After hearing the case, the proofs and

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allegations, judgment is reserved until April 21st, 1920, at 10 A. M."

"And now April 21st, 1920, Defendant is sentenced to pay $25.00 fine and costs."

It is to be observed, first, that before imposing the fine, the defendant was not adjudged to be guilty of any offense, and, second, that, in so far as the docket entry is concerned, there is no charge preferred against defendant, except that which is expressed in the indefinite caption: "Violation of Game Law."

The question on this record is whether, on certiorari, such a record will withstand a specification of its insufficiency in these respects.

Although the docket-entry is vague as to what offense against the law renders the accused liable to the penalty imposed, we find this in the affdavit of the complainant, (who is a Constable), where through the issuance of a warrant in the case appears to have been received from the Justice, viz: "That at St. Clair Township in the County of Westmoreland, on the 8th day of January, A. D., 1920, and various other dates within two years last past, Elmer Decker, the above named defendant, did harbor, and have in his control, several dogs, and did neglect and refuse to take such actions as was necessary to prevent such dogs from running elk or deer—contrary to law and Act of General Assembly in such cases made and provided."

If this can be considered as defining the charge against the accused,—and we have nothing better,—the extent of the definiteness thereof, in a criminal proceeding before a Justice determines the character of that charge against the accused. It is not to be presumed against a defendant that his offending has any material features outside of what is expressly mentioned in the charge.

The Act of 1 May, 1909, sec. 19, P. L. 325, contains, inter alia, this:

"It shall be unlawful for any person, at any time, to shoot at, or to kill, wound, or capture any deer in the waters of any of the streams, ponds, or lakes within this commonwealth; OR FOR ANY PERSON TO MAKE USE OF A DOG IN HUNTING DEER WITHIN THIS COMMONWEALTH; and the fact that a dog of any description shall be taken into the woods, or shall be had in possession or under control in the

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woods, or shall be cared for or harbored, or permitted to remain with any individual, or in camp of any person or persons who may go hunt during the open season for deer in this state, shall render each person in whose care or under whose control the dog may be outside of the camps, liable to the full penalty prescribed by law for the unlawful taking or killing of deer within this commonwealth, upon proof duly sworn to that the dog so taken into the woods, or had in possession or under control or harbored, cared for, or permitted to remain with any person, or in any camp of any person or pesons, and within a radius of ten miles from said camps, ro from the point wherein a dog may be taken by any individual, run after, pursue or follow upon the track of any deer or fawn, for a distance of one hundred yards."

The inhibition of this provision is plainly aimed at the suppression of an unlawful mode of hunting and killing deer in the open season,—that is to say, with dogs, or of even taking dogs into the woods to hunting-camps, where hunting parties or individuals are engaged in hunting deer.

Whether in season or out of season, it is made unlawful to shoot at or kill any deer in the waters of any stream. That is a forbidden place. Even in the open season, when it is not, in itself, an unlawful act to kill deer by a proper mode, it is made unlawful to make use of a dog in hunting deer. That is a forbidden mode of hunting deer.

In elaboration of circumstances evidentiary of a violation of this last mentioned mode of violating the statute, it proceeds to say that the taking of a dog into the woods to a camp of any person or persons who may go there to hunt deer during the open season, shall render any person in whose care or under whose control the dog may be, and each person in the camp liable to a prescribed penalty—upon the production of a certain kind of evidence, viz: that the deer, so taken and kept, did, within a radius of ten miles from said camp, or from the point wherein a dog may be taken by any individual, run after, pursue, or follow upon the track of any deer or fawn, for a distance of one hundred yards. It is an unlawful act to take a dog into the woods to a deer-hunters' camp. If that is done the dog pursues, or follows on the track of deer, for one hundred yards—that is sufficient evidence to prove that deer is being hunted by a pro-

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hibited mode, and all responsible for that mode of procedure are made subject to a prescribed penalty, when the necessary proof has been adduced.

Certainly the Justice's record, as he has returned it, shows the doing of no act penalized by the provision of the section of the statute quoted above—and it is not claimed that any other provision of the game law has been violated. "Violation of Game Law," defines no offense whatever. Even taking the affidavit made by the prosecutor at the time of obtaining the warrant, to constitute a part of the Justice's record, the following words therein contained, define no offense under the quoted statute, viz: "defendant did harbor and have in his control several dogs and did neglect and refuse to take such actions as was necessary to prevent said dogs from running elk or deer."

There is no offense such as those words describe. "If the action was intended to be based on the statute quoted, the very substance of what constitutes the offense is omitted in the charge.

In addition to this, there was no judicial ascertainment of defendant's guilt of any offense whatever.

Prior to fining the defendant, there was rendered by the Justice no judgment of guilt. Although the rendering of a judgment after the hearing was continued to a designated date, yet, on that date, nothing was done, except to impose a fine on him—What for? By virtue of what adjudication? We do not know.

For these reasons, we think the Justice's record is fatally lacking in matters of substance, and the proceedings are, therefore, reversed.

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COMMONWEALTH vs. BERELLA.

Costs in assault and battery cases.—Constitutional law.—Assessment of costs under Act of 27 May, 1919, P. L. 306, by a magistrate not violative of right of trial by jury.—Acts of 23 September, 1791, 3 Sm. L. 43; 7 Dec. 1804, 4 Sm. L. 204; 28 March, 1805, P. L. 166 and 31 March, 1860, P. L. 145, reviewed and considered.

No constitutional right of a prosecutor to have his liability to costs in assault or an assault and battery case tried only by a jury is interfered with by the Act of 27 May, 1919, P. L. 306, when an unfounded occasion brought by him has been properly dismissed by the committing magistrate.

The sufficiency of a record demanded by law in such cases is not that the record of the magistrate should have the completeness of a record in the case of summary conviction but only such completeness is required as is essential to the record of a committing magistrate at the preliminary hearing.

In the Court of Common Pleas of Westmoreland County, No. 174 August Term, 1920. Certiorari.

Gregg & Gregg, and P. K. Shaner, for appellant.

No appearance for appellee.

McConnell, P. J.: Certiorari to proceedings of Justice at a preliminary hearing of a criminal case, charging the defendant with assault and battery—which case was dismissed by the Justice, after hearing the evidence,—and the costs were, by the Justice, placed on the Prosecutrix in the case, who now brings the Justice's record into court, for review, to test its legal sufficiency.

The main illegality alleged by the plaintiff in error to be manifested by the record, is the therein recorded action of the Justice, in imposing the costs on the Prosecutrix in the case, a burden, which she, as plaintiff in error asserts, the law has not imposed on her, and it, therefore, was beyond the power of the Justice to impose them on her. It is claimed that a Prosecutrix is immune from liability to the burden of costs, unless subjected thereto by the action of a Grand Jury in dismissing a bill of indictment for a misdemeanor —or by a petit jury at the trial and acquittal of an indicted defendant for an offense at the trial and acquittal of an indicted defendant for an offense of that grade.

It is true that, prior to the 27th of May, 1919, there was no statutory authority warranting the now-disputed action of the Justice, but, on that date, (see P. L. 306),—there was approved an Act of Assembly entitled: "AN ACT relating to criminal procedure before aldermen, justices of the peace, and magistrates, in cases of assault, and assault and battery, and providing for the assessment of costs in such cases upon the prosecutor or defendant in case of default."

The second section of that Act contains the following provision: "In all such cases, when the evidence does not show

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that the prosecution is well founded, the alderman, justice of the peace, or magistrate shall discharge the defendant, and determine by whom the costs shall be paid. In assessing the costs, he may order that the prosecutor or defendant pay all, or any part thereof, or he may assess the costs on the county. In default of payment of any costs so imposed on the prosecutor or defendant, the person so defaulting shall be committed to the county jail, one day for each dollar of such costs or until such costs are paid, or until such person is discharged according to law, and, in such cases, the costs shall be paid by the county."

Presumably, the Justice in this case acted pursuant to the authority of this statute in imposing the costs on the Prosecutrix, and, if so, we must presume also, that the case was dismissed because the evidence disclosed that it was not well-founded, and that for some reason disclosed through a consideration of the case and deemed adequate by the Justice, the imposition of the costs on the prosecutrix seemed to be merited. Any one familiar with the power over costs given by the criminal procedure Act of 31 March, 1860, P. L. 145, regulating procedure conducted in court, knows that such power is exercisable only where, either a bill of indictment has been drawn and presented to the grand jury for its action, or after a true bill has been found by a grand jury, and a petit jury trying a defendant under it for a misdemeanor has acquitted the defendant, and thereupon has passed on liability for costs.

But those regulations of procedure under that Act pertain only to proceedings in courts, and when juries perform their assigned functions therein, in the administration of criminal justice. Those regulations do not purport to regulate any proceedings before a justice of the peace at a preliminary hearing, when he discusses a case that the evidence does not show to be well-founded, and they, therefore, give to a justice no authority, under such circumstances, to determine liability for costs, and to impose them on a prosecutor.

On the other hand, the Act of 27th May, 1919, relates solely to procedure before a justice at a preliminary hearing, and, also, in a preliminary hearing only in one particular form of criminal charge, viz: only in cases of assault, and assault and battery, when a charge is dismissed by him.

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Prior to the passage of this last mentioned Act, there was no attempt in the statute-law of this State to impose liability for costs on a prosecutor, in any kind of a criminal case, before it reached a court authorized by law to dispose of indictments, by action of its juries. The novelty of this statute consists mainly in its attempt to invest the justices of the peace, on the dismissal of a case, with some of the powers over costs theretofore exercisable only by jurors, in proceedings conducted in the criminal court.

It is alleged that this attempt of the legislature to give authority over costs on the dismissal of a charge of assault and battery to the magistrate, renders this new Act of Assembly unconstitutional and void, and that, therefore, the justice's action in imposing costs on the prosecutrix is powerless. Is it beyond the constitutional power of the legislature to enact such a law?

The thing in the constitution that is claimed by counsel for the plaintiff in error, to render the act unconstitutional, is, that it deprives the plaintiff in error of a trial by jury, and that only by judgment of a jury can she become liable for costs in a case that is not well-founded.

Article I, Section 6, of the present constitution, reads as follows: "Trial by jury shall be as heretofore, and the right thereof remains inviolate." Substantially this same provision has been contained in every constitution Pennsylvania has ever had. Is that provision violated by the Act of 1919?

At the common law, there was no liability on a prosecutor in a criminal case to pay costs. He was but a witness for the commonwealth. Prior to the revolution the King neither paid nor received costs, and a prosecuting witness enjoyed the same rights and immunities. After the revolution, the Commonwealth took the place of the King, and the prosecuting witness remained as immune as before, to liability for the payment of costs—unless some statute provided otherwise. In fact, the whole system regulating "costs" in this Commonwealth is statutory—no such thing as "costs" (eo. nomine), being dealt with by the common law. This was the condition of the law at the birth of the Commonwealth. In Irwin v. Northumberland County, 1 S. & R., at page 509, Justice Yeates says: "The prerogative of the Crown shielded the prosecutor from the payment of costs on an indictment, and this principle continued as to the commonwealth after

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the American revolution, until the 7 December, 1894, when a law passed,

(3 Smith's Laws, 204,), 'to regulate the payment of costs, on indictments; whereby grand and petit jurors were empowered to decide, whether the county, prosecutor, or defendant, should pay the costs. But antecedently thereto, the defendant, whether convicted or acquitted of the offence charged, was obliged to pay the costs, and left to his remedy against the prosecutor, by action of malicious prosecution. If he was convicted, the payment of costs formed part of the sentence; if acquitted, he was discharged on payment of fees. When he was permitted to leave the walls of the prison, the officers and witnesses looked to the sheriff for reimbursement of their respective fees."

However, to relieve a defendant from the supposed hardship of being liable to payment of costs where an unfounded accusation had been made against him, and, on that account, he had been discharged from liability from the crime charged, the 13th section of the Act of 23rd September, 1791, (3 Sm. Laws, page 43,), was passed, and it provided as follows: "That where any person shall be brought before a court, justice of the peace, or other magistrate of any city or county in this commonwealth, having jurisdiction in the case, on the charge of being a runaway servant or slave, or of having committed a crime, and such charge, upon examination, shall appear to be unfounded, no costs shall be paid by such innocent person, but the same shall be chargeable to and be paid out of the county stock, by such city or county."

That statute, in dealing with the question of costs, was not only in view of proceedings in court, but also it was plainly in view of proceedings conducted before a justice of the peace, which proceeding would never reach the court, at all, in case, upon examination by the magistrate, it appeared not to be well-founded, and was, therefore, dismissed by the magistrate.

In the case of the County of Lehigh vs. Schock, 113 Pa. 373, Justice Trunkey says, on page 380: "Section 13 of the Act of 1791 applies to every case where a person is before a magistrate on a charge of having committed a crime, and the charge appears unfounded. No difference is made between crimes that are felonies, and those that are not felonies, or by reason of some being infamous and others not,

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or because some are of a deeper dye than others. The innocent person shall not pay costs. Prosecutions made in good faith are not discouraged by permitting the magistrate to impose costs on the party who made the complaint."

That shows legislation on the subject of "costs" before a justice, and its effect is to there relieve the innocent defendant from the burden of paying them, as it had theretofore rested on him, but in designating where this lifted burden should be thereupon imposed, the statute has not "imposed the costs on the party who made complaint." Therefore, while this legislation does not show any attempt by the legislature to burden a PROSECUTOR with the costs of an unfounded accusation preferred by him, yet it did confide in the judgment of the justice of the peace, in exercising his functions as a committing magistrate, to determine whether or not the charge was unfounded, and, if unfounded, the burden of costs was, according to the terms of the statute, to be placed elsewhere than where the common law would have imposed them, to wit: on the county. Prior to that Act, there was no such liability resting on a county for the costs of a dismissed case.

The 11th section of the same Act had also made the county liable for the costs, in the case of ignored bills, that is to say, when the grand inquest—which was not by law empowered to try a case, but only to pass on the sufficiency of the evidence of the commonwealth, and to determine therefrom whether it, prima facie, reasonably indicated the commission of a crime, so that it was thereby obliged to return the case to court for trial by a jury.

In both the case before the justice, under this Act, and in the case before the grand jury, the liability of the county for costs was only incidental to the determination of those tribunals on the question of whether there was, or was not, an unfounded accusation, and when that was determined in favor of a defendant, and against his accuser, the costs could only be imposed elsewhere than where the common law would otherwise have left them.

At the time this statute was passed, there was a constitution containing a provision about "trial by jury," substantially the same as that contained in the present constitution. The Act of 20th March, 1797, also relieved a defendant of

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costs in case of acquittal by a traverse jury, and imposed them on the county.

On the 7th of December, 1804, (see P. L. 1805, page 3), the legislature further dealt with the subject of liability for costs, in an Act entitled "AN ACT to regulate the payment of costs on indictments." The preamble to that Act shows what prompted the legislation: "Whereas experience has proved, that the laws obliging the respective counties to pay the costs of prosecution in all criminal cases, where the accused is, or are acquitted, have a tendency to promote litigation; inasmuch as they enable restless and turbulent people to harass the peaveable part of the community with trifling, unfounded, or malicious, prosecutions, at the expense of the public; therefore," etc.

Its provisions enabled the Grand Jury, in case of an ignored bill charging a misdemeanor, to determine whether the county, or the prosecutor, shall pay the costs of prosecution; and, in all cases of acquittal in such cases by the petit jury, it should determine whether the county, or the prosecutor, or the defendant, should pay the costs of prosecution. This made it possible to censure restless and turbulent accusers who had unwarrantably preferred a criminal charge, by the placing of costs on them, and this was alone with the view of discouraging charges of that character.

There was a section at the end of this Act which probably made it debatable, whether or not, it would be operative for more than three years from its date, but, on the 28th of March, 1805, P. L. 166, there was passed an Act to give its provisions validity and continued efficacy.

From these early provisions of the statute law on the subject of liability for costs, we learn the origin of the provisions in the code of criminal procedure, for their provisions were later substantially repeated therein.

In the code of procedure, there are provisions, whereby a prosecutor is, under certain circumstances, made liable for costs, when unfounded accusations have been ascertained to have been made by him. But this code relates only to procedure in court, and the liability is thereunder ascertained by a finding of either a Grand or a Petit jury, who have been called upon to perform certain functions in the cases to which the costs are incident. It does not purport to apply to proceedings before a justice, when it is made manifest to

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a justice at a preliminary hearing that a criminal charge of misdemeanor is unfounded,—but the Act of 1919, on the other hand, does purport to apply to procedure before the justice, at a preliminary hearing when he has ascertained from the evidence, that an unfounded charge of assault, or assault and battery had been found to have been made, and it does purport to invest the justice with authority to exercise the function of determining a prosecutor's liability to costs, and, to do it in a manner similar to the manner wherewith the code has invested juries to proceed in exercising that authority. The code, no matter how old its provisions may be, is not a CONSTITUTION, and the mere fact that it has not bestowed the same authority on the justice that is by it bestowed on juries, does not prove that the legislature could not have constitutionally done so, if it had desired.

When, under the code, a petit jury determines that a prosecutor is liable for costs of an unfounded accusation, it is not adjudicating what constitutes a part of the legal issue involved in the charge—but is only determining something collateral and incidental thereto, to which collateral thing, the constitutional right of trial by jury does not necessarily apply, at all.

In Commonwealth v. Tilghman, 4 S. & R., 127 Justice Gibson, speaking of a jury's having imposed costs on a defendant nothwithstanding his acquittal, said: "The defendant is not punished for a matter of which he stood indicted, (for he is acquitted of everything of that sort), though, on account of something of which he was not indicted, some impropriety of conduct, or ground of suspicion, which the verdict of the jury has fastened on him, the statute law refuses to interfere in his behalf and leaves him as he stood at the common law."

The issue, to which the constitutional right of trial by jury attaches, is the charge in the indictment. If there had never been any provision made by statute about costs, whereby the matter of costs could, also, be disposed of by the same jury, the issue to which jury trial constitutionally relates, could be completely disposed of, without consideration of liability for costs at all; and where a statute attached the collateral duty of the jury's dealing with the matter of costs, a statute can constitutionally detach such collateral matter,

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or, at pleasure, can alter the therefore existing liability for costs, and the mode of their imposition.

The disposition of costs, even when made by a jury, is determined by the jury—not because the interested parties, with respect to them, are entitled to the constitutional right of having thir liability to costs tried by jury, but only because the dismissal of a case by a jury, brings into view a situation to be practically dealt with as the incident of the trial of the issue, that only a jury could so understandingly dispose of. When the issue was disposed of by the jury, they it was thought by the legislature—were the best informed about what should be done about what was merely incidental or collateral thereto—and which ought to be disposed of authoritatively by some one.

When the Grand Jury, under the code, determines the liability for costs—that is but the determination of a tribunal that, under the law, has not authority "to try" cases at all, but which only has authority to conduct an inquest with respect to the sufficiency of the foundation for the commonwealth's making such criminal charges—but, when they find a charge not to be adequately sustained, they are then better informed, because of their consideration of the case and all its incidents, as to what should be done in regard to the incidental matter of costs than any other person or tribunal would then be. In so far as the Grand Jury's action is concerned, it could not be properly said that its disposition of costs was effected through a TRIAL BY JURY, at all, for "trial by jury" does not relate to preliminary procedure at all. The function which a committing magistrate performs at a preliminary hearing, is not the TRIAL of the case, but an inquest, preliminary to trial, to ascertain the probable necessity therefor, and when he finds the non-existence of necessity, and dismisses the case, he acts under circumstances similar to those which prevail when a grand jury, for similar reasons, dismisses a case. "The issue before the magistrate is not whether, in fact, the defendant is guilty, but whether there is probable cause to believe him guilty, so as to require an investigation by a jury." Bishop's New Criminal Procedure, section 1233.

Although this Act of 1919 allows the examination of witnesses favorable to the accused as well as witnesses called by the prosecution, yet this is done, not for the purpose of

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adjudicating the case, but only for the purpose of giving the justice fuller information, so that he may know, with more certainty, whether the case should be returned, or dismissed. The justice continues to be a committing magistrate, and not a trier of the case.

A grand jury is, under the code, authorized to dispose of the question of costs. If the Act of 1919 is constitutional, a justice is, also, invested with the same power, when he dismisses an unfounded charge of misdemeanor in the form of assault and battery, and for the same reasons as are presumed to actuate a grand jury when it disposes of a case and disposes of the costs. There are more unfounded accusations which come before justices of the peace, than ever reach grand juries, and there are more such accusations which reach grand juries, than ever reach petit juries. If, in any of these cases, the power of placing costs on a prosecutor of unfounded accusations is intended as a censure for a prosecutor's having presented such an accusation, and also as a deterrant to such conduct in others, why should not the power to exercise such a power for such a purpose, be set by the law at the point of procedure, where such instances of unfounded accusation are most numerous, and where their character can as readily be ascertained by the justice, as it could be, at any later stage determined by either a grand, or a petit jury?

Of course, if the provision of the constitution above quoted has, in fact, made it legally impossible for a justice of the peace to dispose of the costs in the case of a dismissal of an unfounded charge of assault and battery, the practical utility of his exercising such a function cannot override the constitution as it is. But does the provision of the constitution quoted, so operate? That is our question.

What does it mean by the words: "Trial by jury shall be as heretofore, and the right thereof remains inviolate?" "The constitutional provision relative to trial by jury was intended to preserve that right AS IT EXISTED AT THE FORMATION OF OUR STATE GOVERNMENT, AND NOT TO INCREASE OR EXTEND IT, and must be construed with reference to the statutes that were in force in England, and in the province of Pennsylvania at the adoption of the first constitution of the state." Byers v. Commonwealth, 42 Pa., 89. "The purpose of the constitution undoubtedly was to preserve the jury trial whenever the com-

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mon law gave it, and in all other cases, to let the legislature, and the people, do as their wisdom and experience might dictate." Van Swartow, v. Commonwealth, 24 Pa., 131. "Whenever a remedy by trial by jury was provided by the common law at the time of the adoption of the first state constitution, trial by jury must be preserved as an ultimate resort in all modifications of the remedy, or the constitution will be violated." Rhines v. Commonwealth, 51 Pa., 96.

At the time of the adoption of the constitution of 1776, (the first constitution), there had never been a law affording a jury trial to determine the question of liability for the payment of costs,—either as the incident of a case tried by it, or as the subject-matter, of a suit by itself. The Act of 1804 first made the imposition of costs on a prosecutor possible, and that liability was to be ascertained by the finding of a jury, but as to whether he, the defendant, or the county, should bear that burden,—neither the constitution of 1776, nor the constitution of 1790, then in force, had obliged the legislature of 1804 to provide in that law for the fixing of that liability only through the medium of a jury-trial; the legislature could, in so far as any then-existing constitutional provision was concerned,—have as readily made liability to depend on a rigid statutory provision alone—or could have designated some other tribunal than a jury to determine, as between parties, the question of liability—if they had so desired,—and no constitutionally-preserved right of trial by jury would have been thereby transgressed, if they had so done. What the constitution of 1776 sought to preserve inviolate, as it had theretofore existed, all the succeeding constitutions have also sought to preserve inviolate, but without their extending inviolability to the preservation of a right which had no existence at the foundation of the government.

The "heretofore" of all the constitutions is retrospective from 1776, and the provisions about trial by jury, repeated in all subsequent constitutions, are only designed to be preservative of the right as limited and defined at the time the constitution of 1776 was adopted. These subsequent constitutions no more deal with the question of fixing liability for costs by a trial by jury, than the constitution of 1776 had done—that is to say, they do not deal with that matter at all. Where the question to be disposed of was triable by a common law jury at the adoption of the original constitution—

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that right—as then defined and limited—must remain inviolate.

Prior to the Act of 1919, the law with respect to liability for costs—(in so far as consideration is herein involved)—stood as follows: Where a person is accused of any crime, and is brought before a justice of the peace or alderman, and, upon examination, the charge is ascertained to be unfounded, the accused is entitled to be discharged; whereupon, the county is rendered liable for the costs of the magistrate and constable, and also for the daily pay and mileage of the witnesses subpoenaed and in attendance on the part of the commonwealth.

The liability of the county to pay costs in that situation rather than that the defendant should do so, is a liability declared by the statute of 1791, without providing therein for any exercise of the judgment of the justice about it,—but, on the contrary, the county was made liable by the mere ipse dixit of the law itself, and the defendant was relieved of the burden, by the same kind of authority, by a justice.

But the legislature of 1919, believing that that state of the law, with respect to the public's being required to always pay the costs of dismissed cases, was an encouragement to the making, at public expense, of unfounded accusations, and that the public's burden of expense thus imposed in that class of cases, was sometimes an unjust one, sought to alter that law, in respect to cases of assault and assault and battery, when dismissed by a justice, through the provisions of the Act of 7th May, 1919, P. L. 306, so that, instead of costs being disposed of only by a rigid and unvarying rule of the law itself, they might thereafter be disposed of in cases of assault and assault and battery, through the determination of the magistrate,—who would presumably be prompted in each case, by the special circumstances. Under the application of this law, a prosecutor could, at the hands of the justice, receive merited censure for his unwarranted action in the premises, and if a defendant,—though not held —could be censured by the imposition of costs, if his conduct, disclosed by the investigation of the case, seemed to the justice to merit that form of censure, but, if not moved by any such special circumstances to place costs on either the prosecutor or defendant, the justice could assess the costs

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on the county,—as the previous law of 1791, had done in every case, when a criminal charge of any kind was dismissed, by the justice, as being unfounded.

This power of the justice's thus dealing with costs, when an unfounded accusation of assault and battery is dismissed by him, is no greater than the power the law had previously bestowed on a jury, when an unfounded accusation was, by it, dismissed, after investigation, in court.

Because the statute law existing prior to 1919, had only provided for liability of a prosecutor for costs, where a jury is engaged in performing some function in a case wherein an unfounded charge of misdemeanor exist, it does not follow that the statute-law could not be made to provide for such liability, when no jury is concerned, to wit, when an unfounded accusation is dismissed by a justice, nor does it appear that the statute of 1919, now creating such liability of a turbulent and meddlesome prosecutor of innocent persons would be any more violative of the constitution, than it would be in the other case, when the provisions of the Acts of 1804 and 1805 were first enacted with respect to trial in court.

No constitutional right of a prosecutor, to have his liability to costs tried only by a jury, is interfered with by the statute of 1919, when an unfounded accusation brought by him has been properly dismissed by a justice, therefore the specification based on the assumption that the plaintiff in error had such a constitutional right, and that it had been violated by the action of the justice in this case is dismissed.

The sufficiency of the record demanded by law in this case, is not that the record should have the completeness of a record in the case of a summary conviction, but only such completeness is required as is essential to the record of a committing magistrate at a preliminary hearing. I know of no constitutional guaranty of trial by jury, before a prosecutor in an unfounded case of assault and battery can be required to pay the costs,—and that the charge was unfounded in this case, the finding of the justice is conclusive,—and not to be overruled in disposing of a writ of certiorari.

All the specifications of error are dismissed. It is proper to add that it is admitted in the petition presented to court, that the prosecutrix has, in fact, paid the costs imposed by the justice in the case.

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